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# Rwandan Gacaca: An Experiment in Transitional Justice

Maya Goldstein Bolocan\*

## I. INTRODUCTION

For new democracies emerging from destructive violence and massive human rights abuses, reckoning with the past remains the most challenging question. The difficulty lies in crafting a response that can strike the necessary—but inherently problematic—balance among the victims and their families, the perpetrators of horrendous crimes who demand that they be treated humanely and fairly, and a nation that wants to see its past acknowledged while struggling to move forward towards durable peace and democracy.

With the introduction of the state-run Gacaca jurisdictions<sup>1</sup> in June 2002, Rwanda embarked upon what President Paul Kagame has described as “the only way forward.”<sup>2</sup> The law setting up the Gacaca jurisdictions was passed in 2000<sup>3</sup> by the Rwandan transitional government, and most recently amended in June 2004,<sup>4</sup> to try thousands of genocide suspects by means of a decentralized, community-based system of courts inspired by local traditions. Attempting to reduce delays in the overburdened criminal justice system, while at the same time seeking justice and reconciliation, the Gacaca jurisdictions represent one of the boldest

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1. The word “Gacaca” indicates in Kinyarwanda—Rwandan local language—the lawn or grass where communities assemble to resolve community disputes. Although the new system is officially called Inkiko-Gacaca (where the term Inkiko means “jurisdictions”), this article will refer to it by using the terms “Gacaca,” “Gacaca courts,” or “Gacaca jurisdictions.”

2. Interview with Paul Kagame, President of Rwanda (July 16, 2002) (cited in Gacaca Jurisdictions: Interim Report of Observations June 10 – Aug. 8, 2002), available at [http://www.fas.harvard.edu/ursoctud/rwanda/introduction.html#\\_ftn4](http://www.fas.harvard.edu/ursoctud/rwanda/introduction.html#_ftn4) (last visited Oct. 24, 2004) [hereinafter *Gacaca Jurisdictions*]. See generally the official web site of the Republic of Rwanda at <http://www.rwanda1.com/>.

3. Organic Law No. 40/2000 of 26/01/2001 setting up “Gacaca jurisdictions” and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994, available at [www.Inkiko-gacaca.gov.rw/textes/legaux.html](http://www.Inkiko-gacaca.gov.rw/textes/legaux.html) (last visited Oct. 24, 2004).

4. Organic Law No. 16/2004 of 19/6/2004 Establishing the Organization, Competence and Functioning of Gacaca courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, available at [www.Inkiko-gacaca.gov.rw/](http://www.Inkiko-gacaca.gov.rw/) (last visited Oct. 24, 2004).

and most original “legal-social”<sup>5</sup> experiments ever attempted in the field of transitional justice. By blending retributive and restorative approaches in an innovative way, Gacaca courts represent a unique opportunity to seek justice in an open, accessible, and participatory fashion. Nonetheless, several deficiencies are present in the Gacaca law—especially with respect to fair trial standards—that, coupled with the prevalent political and human rights climate in Rwanda, may seriously impair the effectiveness of the Gacaca jurisdictions in seeking justice.

Far from being irreconcilable, both a degree of retribution and reconciliation are possible, and are indeed desirable, under Gacaca. This paper argues that shifting the emphasis from the retributive nature of Gacaca to its restorative potential may, in the long term, offer better perspectives of peace and reconciliation to a deeply wounded society. It also argues that, where Gacaca retains its retributive element, it should do so while trying to respect the human rights of those brought before it. Part II of this paper briefly discusses the dominant model of transitional justice, namely the prosecutorial approach of criminal trials, and its effectiveness vis-à-vis alternatives that emphasize the search for truth and reconciliation instead of retribution. Part III provides a brief background on the genocide in Rwanda and examines the major shortcomings of criminal prosecutions by both the International Criminal Tribunal for Rwanda (ICTR) and by the Rwandan government in seeking justice and reconciliation. Part IV considers the newly conceived role of the Gacaca jurisdictions in trying genocide-related cases. This section first briefly reviews the traditional Gacaca as a community-based, informal dispute resolution mechanism. It then presents the modernized, state-mandated Gacaca jurisdictions and their role in complementing the ordinary criminal justice system. Part V critically assesses the unique retributive and restorative nature of this system, highlighting the tension between the two. It ponders some of the major benefits (provision of accessible, participatory justice) and shortcomings (lack of due process guarantees and adequate punishment), as well as the socio-political context in which Gacaca courts operate. Part VI proposes ways to strike a balance between these two conflicting approaches. It argues that if Gacaca is to retain a retributive element, efforts should be made to minimize due process concerns. At the same time, if the purpose is to achieve accountability while seeking reconciliation, the emphasis on restorative justice should be strengthened. This section of the paper also suggests that Gacaca could be used in conjunction with a truth commission. The conclusion highlights the potential benefits of Gacaca and its contribution to devising future accountability mechanisms in the aftermath of mass atrocities. It stresses that an approach that combines retributive and restorative justice measures may better suit the complex needs of transitional societies.

## II. TRANSITIONAL JUSTICE: THE ONGOING DEBATE

In the aftermath of mass violence and gross human rights abuses, both the concerned societies and the international community struggle in finding responses

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5. See Peter Uvin, *The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda* (June 2000) (discussion paper) (prepared for the Belgian Secretary of State for Development and Cooperation), available at <http://fletcher.tufts.edu/humansecurity/scholarpapers.html> (last visited Oct. 24, 2004).

that adequately address multiple, challenging, and often competing goals. While seeking justice—in the strict sense of obtaining punishment for perpetrators and redress for victims—is often the most immediate goal, there are other, critically important, objectives that should be considered in devising mechanisms of accountability. These include: rendering a truthful account of the past, pursuing reconciliation, deterring and preventing the occurrence of future violence and abuses, and advancing the rule of law while strengthening the foundations of the new democratic order.<sup>6</sup>

While several approaches to accountability exist, this chapter focuses on two often conflicting, but not irreconcilable, perspectives: retributive justice, and restorative justice.<sup>7</sup>

### III. SETTLING ACCOUNTS: THE RETRIBUTIVE JUSTICE MODEL

Since the Second World War, the dominant paradigm for dealing with past human rights abuses has been the retributive form of justice embodied in the Nuremberg trials.<sup>8</sup> This model of individual accountability forms the basis of modern human rights law, which has now evolved to recognize the existence of a duty to prosecute—at the international or national level—for crimes against humanity, war crimes, genocide, and torture.<sup>9</sup>

International criminal tribunals for the former Yugoslavia and for Rwanda, new hybrid international-national war crimes courts, the ever-growing list of countries exercising universal jurisdiction over crimes against humanity committed in other nations, and the establishment of the International Criminal Court, have all contributed to the ‘globalization’ of the retributive approach, reinforcing the view that the primary road to justice is through criminal prosecutions.<sup>10</sup>

Proponents of this form of accountability rightly observe that justice is all too often bartered away for political settlements, with impunity as the bitter price to be paid to secure an end to ongoing violence and repression.<sup>11</sup> They seem to share the basic assumption that, although not always feasible, prosecuting perpetrators

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6. See Jane E. Stromseth, *Introduction: Goals and Challenges in the Pursuit of Accountability*, in ACCOUNTABILITY FOR MASS ATROCITIES: NATIONAL AND INTERNATIONAL 1, 5-11 (Jane E. Stromseth ed., 2003) (for a general discussion of goals of accountability efforts).

7. See generally M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in POST CONFLICT JUSTICE 3, 26-39 (M. Cherif Bassiouni ed., 2002) (classifying accountability measures according to their goals: truth, justice and redress). Accountability options include: international prosecutions, international and national investigatory commissions, truth commissions, national prosecutions, national lustrations mechanisms, civil remedies, and mechanisms for the reparation of victims. *Id.*

8. See Ruti Teitel, TRANSITIONAL JUSTICE 31-39 (2001).

9. For a general discussion of the duty to prosecute gross human rights abuses amounting to *jus cogens* crimes under international law see Bassiouni, *supra* note 7, at 26. See also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

10. See Mark A. Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 PUNISHMENT & SOC'Y 287, 296-97 (2000) [hereinafter Drumbl, *Sclerosis*] (stating that the “law and order” western paradigm is “going global”). See also Peter E. Harrell, RWANDA’S GAMBLE: GACACA AND A NEW MODEL OF TRANSITIONAL JUSTICE 40 (2003) (referring to the prevalence of the “liberal-prosecutorial” model in transitional justice).

11. Bassiouni, *supra* note 7, at 7-8 (stating that, in such instances, justice becomes the “victim of realpolitik”).

of mass atrocities is the optimal, preferable method for dealing with past injustices.

Prosecutions for gross human rights abuses of a prior regime can indeed serve several important functions. They can discourage future human rights abusers, curtail vigilante, retaliatory justice, and foster respect for the rule of law and the new democratic order.<sup>12</sup>

Establishing individual accountability by way of criminal trials is not only essential to achieve some degree of justice, but is also an effective way of demarcating the past from the present. As observed by Neil Kritz, trials communicate that the "culture of impunity" that permitted heinous abuses to be perpetrated in the first place is being replaced by a "culture of accountability," providing some degree of security to victims while at the same time admonishing and deterring potential future abusers.<sup>13</sup> Criminal prosecutions of human rights violators may provide some victims with a "sense of justice and catharsis," a sense that, by having addressed their grievances, their suffering can at last, more easily, come to an end.<sup>14</sup>

By assigning individual responsibility, criminal trials significantly point out that specific individuals have committed the crimes in question, not an entire ethnic or religious group. The individualization of accountability and punishment may not only be just, but also necessary to overcome dangerous "patterns of vengeance and collective blame."<sup>15</sup> Thus, prosecutions may help curtail the recurrence of vigilante justice and promote social peace in the long term.<sup>16</sup> Dispensing justice through criminal trials may also favor reconciliation between victims and offenders.<sup>17</sup> Failing to do so, on the other hand, fosters resentment and contempt for the law and is deemed as one of the main reasons for the continued perpetration of grave human rights violations throughout the world.<sup>18</sup> Trials may also provide a public account and acknowledgment of the past. When they are conducted in accordance with full due process, they are deemed to represent "the most authoritative" (if not the only) version of the truth.<sup>19</sup>

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12. Michael P. Sharf & Nigel Rodley, *International Law Principles on Accountability*, in POST CONFLICT JUSTICE 89, 90 (Cherif M. Bassiouni ed., 2002).

13. Neil Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST CONFLICT JUSTICE 55, 58 (Cherif M. Bassiouni ed., 2002) [hereinafter Kritz, *Progress and Humility*]. See also Orentlicher, *supra* note 9, at 2542 (identifying criminal punishment as "the most effective insurance against future repression").

14. Neil Kritz, *The Rule of Law in the Postconflict Phase*, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 587, 595 (Chester A. Crocker & Fen Osler Hampson eds., 1996) [hereinafter Kritz, *Postconflict Phase*].

15. See Stromseth, *supra* note 6, at 7. See also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 122 (1998) (asserting that trials may "convert the impulse for revenge into state-managed truth-seeking and punishment").

16. Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 382 (2003).

17. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 6 (2003).

18. Sharf & Rodley, *supra* note 12, at 90 (referring to the conclusion of a report of the U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities).

19. *Id.* (stating that "criminal trials can generate a comprehensive record of the nature and extent of the violations, how they were planned and executed, the fate of individual victims, who gave the orders and who carried them out").

While prosecutions can reinforce the rule of the law by discouraging personal vendettas, failure to adequately punish former human rights abusers breeds cynicism and distrust towards the new political order. As stated by Ruti Teitel, where trials are in keeping with the “full procedural legality associated with working democracies . . . [they] express public condemnation of aspects of the past, as well as public legitimization of the new rule of law.”<sup>20</sup>

At a minimum, beyond any utilitarian justification, criminally prosecuting individual violators represents a moral duty owed to the victims of atrocious acts. In particular, it affords them a partial remedy for their injuries and helps them restore their dignity.<sup>21</sup>

Prosecutions should be initiated, first and foremost, at the local level. Nevertheless, international prosecutions for gross human rights abuses may be able to provide justice where the concerned national systems are unwilling or unable to do so.<sup>22</sup> International prosecutions present some advantages over national ones. Unlike local trials, international justice may be less subject to allegations of bias—or victor’s justice.<sup>23</sup> Justice dispensed through international forums will also have a broader, more powerful impact than a domestic process.<sup>24</sup> First, from a deterrence point of view, it emphatically communicates to potential perpetrators of atrocious crimes, not only in the country concerned, but worldwide, that they will not escape international stigma and condemnation for such atrocities.<sup>25</sup> Second, it contributes to the development and interpretation of international criminal and human rights laws.<sup>26</sup>

#### IV. THE LIMITS OF CRIMINAL PROSECUTIONS

The ability of the punitive approach to promote justice, social reunion, and reconciliation through criminal trials has been questioned by some observers.<sup>27</sup> Due to either lack of political will or scarcity of resources, transitional justice in the form of criminal trials has been sporadic and selective, both at the local and

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20. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2037 (1997). See also David Dyzenhaus, *Debating South Africa’s Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 311 (1999) (stating that the “pursuit of retributive justice in a transition to democracy is thought to be important, not only because of the intrinsic worth of doing justice, but also because the enactment by the courts of the rituals of retributive justice will educate society in the practices of the rule of law that are crucial to the stability of democracy”).

21. Sharf & Rodley, *supra* note 12, at 90.

22. See Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9, art. 17, Annex II (1998).

23. See Kritz, *Progress and Humility*, *supra* note 13, at 58.

24. *Id.*

25. *Id.*

26. *Id.*

27. See generally Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002); Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73 (2002) [hereinafter Daly, *Transformative Justice*]; David Little, *A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies*, 13 ETHICS & INT’L AFF. 65 (1999); MINOW, *supra* note 15, at 25-51 (for a general discussion of shortcomings of criminal prosecutions).

international level.<sup>28</sup> Because massive human rights violations are often perpetrated by a great number of people, far from fostering stability and reconciliation, prosecution of every single perpetrator may be “politically destabilizing, socially divisive, and logistically and economically untenable.”<sup>29</sup> Where criminal prosecutions have taken place, they have been time-consuming and incremental, invariably subject to compromise and pragmatism.<sup>30</sup> Moreover, they have frequently been conducted in disregard of international due process guarantees. This has made them subject to claims of partisan, victor’s justice. Thus, prosecution of a small number of perpetrators will be the best available option in most circumstances. Understandably, this selectivity has seriously undermined perceptions of fairness.<sup>31</sup>

Criminal trials may also be incapable of producing a comprehensive version of the truth both because of the circumscribed scope of each trial’s inquiry with its focus on specific, individual facts and events, and because of the manipulation and misuse of rules of evidence characterizing their adversarial nature.<sup>32</sup> In this setting, a victim’s opportunity to tell her full story is often denied. By placing justice in the hands of lawyers and impartial administrators, trials may have a disempowering effect on victims, leaving them with the sense that justice has not been done.<sup>33</sup>

Because of their focus on the individual responsibility of voluntary perpetrators, criminal prosecutions may be ill-suited to deal with gross human rights

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28. See MINOW, *supra* note 15, at 122 (observing that, at best, tribunals can try only a small percentage of those involved in collective violence on the scale of what happened in Bosnia, Rwanda, Argentina and Cambodia). See also Carnegie Council on Ethics and International Affairs, Evaluating Justice and Reconciliation Efforts (statements of Paul van Zyl excerpted from the panel discussion “Memory, Justice and Reconciliation: Coming to Terms with the Past”), available at [www.cceia.org/viewMedia.php](http://www.cceia.org/viewMedia.php) (last visited Oct. 24, 2004) (arguing that in transitional scenarios it is often impossible to prosecute more than a tiny fraction of those responsible for a variety of reasons: collapse or incapacitation of the criminal justice system; impossibility of prosecution according to due process in criminal justice systems that have long functioned under authoritarian rule; the difficulty of making policy choices as to whether to prosecute past or current crimes; challenges faced by practical difficulties of prosecuting crimes of the state as opposed to ordinary crimes; difficulty in allocating scarce economic resources; high cost of trials and their time consuming nature; difficulties linked to the issue of jurisdiction in international trials).

29. Aukerman, *supra* note 27, at 51-52 (citing Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 138-39 (1996)).

30. See Daly, *Transformative Justice*, *supra* note 27, at 103 (arguing that criminal prosecution “does nothing to tell the anxious population that something is being done now to ease the pain” and that “a strategy of extensive criminal trials is not an appropriate resolution for most current transitions”).

31. See MINOW, *supra* note 15, at 40-45. See also Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 270-71 (2003) (arguing that selectivity also compromises the deterrent value of prosecution) [hereinafter Drumbl, *Criminology*].

32. See Daly, *Transformative Justice*, *supra* note 27, at 103. See also Drumbl, *Sclerosis*, *supra* note 10, at 293 (affirming that courts create “microscopic and logical truths” emerging from carefully controlled situations and based on a sequential proof of facts beyond a reasonable doubt); Donald W. Shriver, *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 8-9 (2001) (arguing that the prohibition of hearsay, rumor, and even references to previous criminal records may “screen out many version of fact,” and comparing the courtroom to a playing field in which the “most skilful, rather than the most truthful, side will win”).

33. See Drumbl, *Sclerosis*, *supra* note 10, at 294 (stating that criminal trials may paradoxically lead to a “conflict between victims and due process,” where protecting the defendant’s due process rights may irremediably affect the scope, content and form of the victim’s account).

abuses committed by mass segments of the population. In such cases, in fact, often individuals act collectively “with varying degrees of responsibility and under varying degrees of coercion,” which makes it difficult to apply ordinary principles of criminal law.<sup>34</sup> The focus on selected individuals cannot account for the structural, inner causes of the violence or uncover the complex connections existing between people that made the massacres possible.<sup>35</sup>

Finally, due to their adversarial and divisive nature, trials are not likely to succeed in producing reconciliation, or at least stability, in highly polarized, post-conflict societies.

International trials, while suffering from many of the shortcomings attributed to domestic ones, also suffer the problems associated with “externalized” justice due to their physical and psychological disconnect with the local population.<sup>36</sup> This makes it more difficult for them to have an educational and deterrent impact, provide victims with the sense that justice is being done, as well as foster new democratic values.<sup>37</sup>

## V. ALTERNATIVES TO THE PROSECUTORIAL MODEL: RESTORATIVE JUSTICE

In the aftermath of mass violence, the exclusive recourse to criminal trials, adjudication, and imprisonment as mechanisms of individual accountability may do little to promote justice and societal regeneration. Advocates of a different approach question the offender-specific, backward-looking, and strictly punitive nature of the kind of justice normally associated with criminal trials, and suggest alternative methods of reckoning with past abuses.<sup>38</sup> In their view, this type of violence may require a “broader form of justice that includes reparations for victims, shaming for ambivalent bystanders, apologies from aggressors, and giving some voice to victims.”<sup>39</sup>

Unlike retributive justice, which considers crime primarily as an act against the state and a violation of its laws, restorative justice views crime as a conflict between individuals that results in injury to the victims, as well as the community

34. Daly, *Transformative Justice*, *supra* note 27, at 105. See also Aukerman, *supra* note 27, at 41 (arguing that mass atrocities such as genocide may be “qualitatively” different from ordinary crime because of the number of victims involved and because they are typically undertaken, or at least supported, by state or quasi-state actors for political reasons).

35. See MINOW, *supra* note 15, at 47 (stating that trials are not an “ideal” tool in helping to achieve consensus over controversial, complex events). See also Drumbl, *Sclerosis*, *supra* note 10, at 298 (arguing that situations of mass violence like the Rwandan genocide, where the deviant behavior is not the exception but the rule, pose a significant challenge to criminal law, which is predicated upon punishing only deviant behavior, and that the characteristic dichotomy between innocence and guilt produced by trials downplays the importance of collective wrongdoing).

36. See Sriram, *supra* note 16, at 379-90.

37. *Id.*

38. See Carnegie Council on Ethics and International Affairs, *supra* note 28 (statements of David Little).

39. See Mark A. Drumbl, *The (Al)lure of the Genocide Trials*, in EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS 217, 219 (David Barnhizer ed., 2001) [hereinafter Drumbl, *(Al)lure of Genocide Trials*]. See also Jennifer J. Llewellyn & Robert House, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 388 (1999) (generally arguing that restorative justice is “model” justice in transitional contexts).



and the offenders themselves.<sup>40</sup> This approach envisions crime as a “violation of people and relationships” that “creates obligations to make things right,” and justice as an interactive process that engages the victim, the offender, and the whole community in a search for solutions which promote reintegration, repair, reconciliation, and reassurance.<sup>41</sup> Because crime is seen as an injury that violates personal and communal harmony, restorative justice adopts a process of “bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime” in an attempt to restore victims, offenders, and communities in a way that all stakeholders can agree is just.<sup>42</sup> These principles seem to situate restorative justice between vengeance and forgiveness. Unlike retribution, restorative justice is forward-looking—it tries to repair the relationships that have been broken by the offense and to reduce the causes of hostility and estrangement through reparations and compensation.<sup>43</sup> It is also a victim-centered process, as it provides a forum in which offenders listen to victims and answer their questions.<sup>44</sup> In this way, “victims can hear offenders explain the circumstances behind the crime, express remorse, and take responsibility.”<sup>45</sup> In order to achieve healing, restorative justice calls for restitution to the victim by the offender.<sup>46</sup> This is intended to restore the victim’s status to the extent that is possible and to stop the cycle of violence, instead of escalating it through retributive, or forceful, responses.<sup>47</sup> Restitution is also an act of account-

40. See Laura Stovel, When the Enemy Comes Home: Restoring Justice After Mass Atrocity 2-3 (June 2003) (paper presented at the Restorative Justice Conference, Vancouver), available at [www.sfu.ca](http://www.sfu.ca) (last visited Oct. 24, 2004).

41. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990). See also Stovel, *supra* note 40, at 2. The two approaches to justice reflect two distinct ethics. “The ethic of the dominant legalistic justice system emphasizes obedience to moral principles presumed to be partly reflected in the law. *Id.* It views crime as law breaking and a violation against the state and accountability as punishment for breaking the law.” *Id.* Restorative justice, on the other hand, reflects an ethic of care according to which people are ethically responsible for people with whom they have a relationship. *Id.* While legalistic justice views justice primarily as procedural equality, and appropriate punishment for the crime by impartial adjudicators, restorative justice assumes that humans are relational beings who need to live in community with others, and sees a crime as a violation of another person. *Id.* at 3. The injury thus caused not only violates the victim and those close to him, but also creates “rifts” between the community, and both the victim and the offender. *Id.* When a crime occurs, the victim feels less secure in the community and needs to heal from the shock, while the “offender has lost the trust of both the victim and the community and has to work to earn that back.” *Id.* at 3-4.

42. David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 320 (discussing John Braithwaite’s approach to restorative justice). See Carrie J. Niebur Eisnaugle, Note, *An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 214 (2003) (arguing that restorative justice focuses on dialogue between individuals or groups that are in conflict by encouraging them to deal with each other directly, face to face, rather than through an advocate such as a lawyer or a diplomat). The two main approaches to restorative justice are family group conferencing and victim-offender mediation. Stovel, *supra* note 40, at 4.

43. Carnegie Council on Ethics and International Affairs, *supra* note 28 (statements of David Little).

44. Stovel, *supra* note 40, at 5-6.

45. *Id.* at 6. Stovel argues that, “Beyond testifying, victims are rarely considered in criminal trials processes.” *Id.* at 5. “Their needs to have input in the trial, receive information, ask offenders questions and receive compensation from him are rarely met.” *Id.* “[O]ffenders have no incentive to cooperate in the process of truth telling.” *Id.* at 6. “Trials are ill-suited to bring out plentiful and context rich information.” *Id.*

46. Eisnaugle, *supra* note 42, at 215.

47. *Id.*

ability, where the offender takes responsibility for the harm caused and takes action to repair it.<sup>48</sup> Restorative justice may also be the best way to reintegrate offenders back into their communities and allow them to make amends for their actions.<sup>49</sup> Finally, it empowers communities to seize and deal with conflicts and tensions that arise between them.<sup>50</sup>

In recent years, some commentators have seen restorative justice as having the potential to address—at least in part—the needs of the victims of mass atrocities, while providing some degree of accountability and enhancing the prospects of a peaceful transition.<sup>51</sup> This different kind of justice may be used in alternative, or better in parallel to, normal judicial procedures, normally in the form of truth commissions.<sup>52</sup> The benefits of this approach in the context of transitional societies emerging from violence seem to be significant. “It is the form of justice most directly concerned with reconciliation [because] [i]t addresses the reintegrative needs of both victims and perpetrators.”<sup>53</sup> In poor countries with weak, inefficient, and corrupt judicial systems, it offers an alternative to lengthy and expensive trials that often lack any public credibility.<sup>54</sup> In such cases, full public disclosure of government sponsored crimes, coupled with sincere apologies and compensation, may be preferable to the unrealistic prospect of destabilizing mass criminal prosecutions. Finally, as is sometimes the case, this form of justice may draw on pre-existing restorative justice practices that are deeply embedded in the local culture.<sup>55</sup>

Truth commissions have thus been able to provide an appealing middle ground between retribution and amnesia, while at the same time representing an avenue through which a more holistic notion of accountability for human rights abuses can be pursued.<sup>56</sup> Although different models exist, the purpose of most truth commissions is to investigate widespread human rights abuses and provide an accurate, official account of the past, and of the broader context in which the violence occurred, while at the same time offering victims a forum to tell their stories and be vindicated, thus achieving some sense of closure.<sup>57</sup>

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48. *Id.*

49. Stovel, *supra* note 40, at 7.

50. *Id.* at 8 (arguing that professionalized justice “steals the conflicts” from the community and robs it of its power, ability, and confidence to face trouble and restore peace).

51. See Aukerman, *supra* note 27, at 81 (stating that restorative justice as a form of conflict resolution is certainly relevant to transitional justice, where the latter’s aim is to achieve “enough forgiveness, reconciliation, or healing to make coexistence possible”).

52. Eisnagle, *supra* note 42, at 222.

53. Stovel, *supra* note 40, at 1.

54. *Id.*

55. Truth and reconciliation commissions established in South Africa and, more recently, in East Timor and Sierra Leone rely on, and incorporate—to a certain extent—customary practices and traditions reflecting a restorative justice philosophy.

56. See Eisnagle, *supra* note 42, at 215 (observing that restorative justice offers “a more ‘holistic’ approach to conflicts than other forms of justice because it is not directed at primarily inflicting suffering on the offender, but rather focuses on the needs of all parties involved in the crime”). See also Llewellyn & House, *supra* note 39, at 356 (arguing that the restorative justice philosophy permeating the South African Truth and Reconciliation Commission offered not only a different, but also a superior model of justice).

57. See Aukerman, *supra* note 27, at 82 (stating that truth commissions “can focus on victims, craft a shared narrative about the past as the basis for a [common] future,” and return conflicts to those concerned by “active[ly] involv[ing] victims, perpetrators, and the larger community”). See also Eis-

While several truth commissions have proliferated around the world over the last twenty years, the most successful to date has been the South African Truth and Reconciliation Commission (TRC)—a semi-judicial body established in 1995 to investigate apartheid era crimes—that expressly endorses a restorative justice philosophy in its mandate.<sup>58</sup> The fruit of political compromise and broad-based consultations, the TRC was seen as representing a bridge between the past of a violent and divided society, and a “future founded on human rights, democracy and peaceful coexistence” for all South Africans.<sup>59</sup> Trading truth for amnesty, the TRC’s main goals were to uncover the truth concerning victims and perpetrators, to restore the dignity of victims and survivors, as well as to search for healing and national reconciliation.<sup>60</sup> While granting amnesty to selected individuals was a controversial aspect of the TRC, it proved to be an extremely effective mechanism in identifying responsibility for human rights abuses.<sup>61</sup> Over a period of two years, the TRC gathered testimonies from approximately 24,000 victims of human rights abuses.<sup>62</sup> It also received amnesty applications and statements from thousands of perpetrators.<sup>63</sup> This narrative process gave victims a chance to relate their suffering, thus providing them with the specific acknowledgment and vindication they had long been denied and, in most cases, with cathartic and psychologically beneficial effects.<sup>64</sup> It helped relatives of those victims to uncover the specific truth regarding abuses committed on their loved ones.<sup>65</sup> Finally, the same

naugle, *supra* note 42, at 224 (reporting that more than twenty truth commissions have been established around the world over the last two decades).

58. This was based on the belief that transcending the divisions of the past required “understanding but not . . . vengeance . . . reparation but not . . . retaliation.” DION A. BASSON, S. AFR. INTERIM CONST., TEXT AND NOTES 1, 339 (1993). The notion of African ubuntu (i.e. the recognition of humanity in everyone) pervades the TRC. Unlike previous truth commissions, the TRC had the power to compel testimony, to stimulate participation by perpetrators in exchange for amnesty, and to link victim testimony to subsequent reparations.

59. Charles Villa-Vicencio, *Restorative Justice in Social Context: The South Africa Truth and Reconciliation Commission*, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 207, 207-08 (Nigel Biggar ed., 2001) (quoting Preamble to the [S. AFR.]. INTERIM CONST. (Act No. 200 of 1993)).

60. *Id.* at 209. The TRC was composed of the following committees: the human rights committee, the amnesty committee, and the reparations and rehabilitation committee. MINOW, *supra* note 15, at 60.

61. Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa*, in POST CONFLICT JUSTICE 743, 751 (Cherif M. Bassiouni ed., 2002). Amnesty from criminal and civil prosecutions was granted upon full disclosure of one’s involvement in political crimes. The amnesty provisions created an enormous incentive on prospective applicants to reveal their responsibility in past abuses, due to their fear of being implicated by their accomplices. *Id.* Due to its reliance on self-incrimination, it permitted the TRC to obtain invaluable evidence about past human rights violations without being burdened by due process requirements. *Id.* at 751-52. Requiring the applicant to prove that the acts had been politically motivated, as opposed to being motivated by personal consideration (which would have resulted in the denial of the grant of amnesty), often caused a “chain reaction” with applicants implicating senior political or other leaders. *Id.* at 752.

62. *Id.* at 746.

63. *Id.* at 751.

64. *Id.* at 747-48. See also Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315 (1999) (generally arguing that the TRC conferred on victims dignity, consideration, and respect by providing them with a forum where they could recount their stories of oppression in a way that forensic constraints of a courtroom would not permit).

65. van Zyl, *supra* note 61, at 748.

process also contributed towards the establishment of a social truth regarding the nature and the impact of human rights abuses on the victims and their families, making it almost impossible to refute and distort such reality.<sup>66</sup>

The TRC hearings allowed both the victims and the perpetrators to tell their side of the story, ask questions, and talk about the impact and consequences of the violence on their lives in order to try to achieve healing. The punishment imposed on those found guilty of apartheid crimes—where they were given amnesty—was not retributive punishment, but was expressed in terms of shame, ostracism, and moral opprobrium.<sup>67</sup> The assumption was that, given an admission of guilt on the part of those involved in various crimes, the process of forgiveness and, ultimately, reconciliation would be significantly advanced, funding the basis for a new moral relationship.<sup>68</sup> In the most optimistic views, public testimonies and acknowledgments of the past provided an opportunity for individuals and the nation as a whole to heal.<sup>69</sup> Importantly, the TRC also held a series of institutional hearings to inquire into the acquiescence and responsibilities of professions and institutions deeply implicated in the apartheid.<sup>70</sup> Though some of those called to participate failed to come forward, these hearings nonetheless highlighted the corrupt and vicious nature of the regime, thus providing a wider context to the uncovered individual abuses.<sup>71</sup> While the commission rightly focused on crimes committed by the apartheid regime, it also made important statements concerning the responsibility of members of the liberation movement for human rights abuses committed by them.<sup>72</sup>

The TRC has sometimes been criticized for denying justice to victims, because it let those responsible of horrible crimes walk away with impunity and without showing any remorse—the TRC legislation only required truth.<sup>73</sup> It has

66. *Id.* at 746-47.

67. Daly, *Transformative Justice*, *supra* note 27, at 154. See also Llewellyn & House, *supra* note 39, at 357 (stating that, “The [TRC’s] emphasis [was] on reintegrative measures that . . . rebuild social bonds, as opposed to measures such as imprisonment that isolate and alienate the perpetrator from society”).

68. See generally MINOW, *supra* note 15; Allen, *supra* note 64.

69. MINOW, *supra* note 15, at 61.

70. van Zyl, *supra* note 61, at 749, 751-52.

71. David Dyzenhaus, With the Benefit of Hindsight 1-3 (June 7-9, 1999) (paper delivered at the conference, “TRC: Commissioning the Past,” University of the Witwatersrand, Johannesburg), at [www.trcresearch.org.za/papers99/dyzenhaus.pdf](http://www.trcresearch.org.za/papers99/dyzenhaus.pdf) (last visited Oct. 24, 2004) (reporting that the institutional hearings were held into the role of the media, the health sector, business and labor, religious organizations and the prisons). In October 1997, the TRC held a three day hearing into the role of the legal community during the apartheid regime. See *id.* Partly prompted by the judges’ refusal to attend the hearing, this focused on their responsibilities and the abdication of their duty to respect the rule of law during the apartheid era. *Id.*

72. van Zyl, *supra* note 61, at 752-53. See also Dyzenhaus, *supra* note 71, at 26 (reporting that the idea for the TRC originated in the context of an African National Congress initiative in the early 1990s to appoint commissions to inquire into the brutalities committed by its own soldiers in training camps).

73. Stephen A. Garrett, Models of Transitional Justice: A Comparative Analysis (Mar. 14-18, 2000) (paper prepared for the International Studies Association 41<sup>st</sup> Annual Convention) (stating that the central ethical dilemma posed by the TRC was whether those who are guilty of brutal crimes should be allowed to go free simply by offering a potentially hypocritical and false contrition for past wrongs), at [www.ciaonet.org/isa/gas02/gas02.html](http://www.ciaonet.org/isa/gas02/gas02.html) (last visited Oct. 24, 2004). But see MINOW, *supra* note 15, at 56 (stating that, far from granting blanket amnesty, the TRC left the door open for prosecutions and civil suits to be brought against those who did not apply for, or were not granted amnesty). See also Benjamin N. Schiff, *Do Truth Commissions Promote Accountability or Impunity? The Case of the*

also been criticized, rightly, for having failed to provide adequate reparation to apartheid victims.<sup>74</sup> While the failure of the current South African government to vigorously prosecute those who failed to seek, or those who were denied, amnesty has been held by some observers as reflecting the limits of the TRC, it rather seems to underscore the inadequacy, weaknesses and biases of the legal system.<sup>75</sup>

Despite these criticisms, the TRC was an overall success. Notably, the TRC condemned and fully revealed a heinous regime, restored victims' dignity by giving public legitimacy to their stories, laid the foundations for the promotion of a human rights-based culture, and instilled in ordinary South Africans a determination that the injustices of the past should never happen again.

## VI. STRIKING THE BALANCE: JUSTICE, TRUTH, AND RECONCILIATION

Truth and accountability are essential if societies traumatized by mass atrocities are to limit destructive ethnic, religious, political and racial conflicts and to recover a degree of stability and peace. What means a society chooses to deal with the past will reflect the balance between competing, multiple goals and will be necessarily context-driven. A combination of factors—social, political, economic, and cultural—should determine what form of justice is not only desirable, but also pragmatically feasible and realistic, in a particular transitional context.<sup>76</sup> These factors include the gravity of the violation, the extent and severity of the victimization, the number of and those who are the accused, the extent to which the violence has subsided, the community's will, as well as the type and nature of the new government.<sup>77</sup> As observed by Mark Drumbl, in the aftermath of broad-based violence involving thousands of victims and perpetrators, like in Rwanda,

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*South African Truth and Reconciliation Commission*, in POST CONFLICT JUSTICE, 325, 331 (Cherief M. Bassiouni ed., 2002) (arguing that fears that the TRC would be too generous in granting amnesty are unfounded since, by late 2000, while the commission had received 7,112 applications for amnesty, it had granted only 849 of these; arguing also that the de facto impunity for most of the "architects of apartheid" was due to the "bias and incapacity" of the legal system, not to the TRC's failure).

74. Those who were granted amnesty were under no obligation to make any compensation to victims or the society. This aspect was criticized even by the most fervent supporters of the TRC. See Llewellyn & House, *supra* note 39, at 388 (arguing that "removing reparation from the amnesty process [not only] seriously limits the connection between amnesty and restoring the victim [but also that], as far as the perpetrator is concerned, amnesty without any way to make amends for one's actions could result [in a] 'shaming machine,' serving to stigmatize, rather than reintegrate, perpetrators"). See also Daly, *Transformative Justice*, *supra* note 27, at 156 (stating that the TRC "produced an imbalance of justice: it granted amnesty to some perpetrators but did not secure meaningful reparations to any victims"); Naomi Roth-Arriaza, *Reparations Decision and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 174 (reporting that, in 2003, South African President Mbeki proposed a one-time grant of about \$3,500 to each victim, a fact that has been strongly criticized by victims' groups).

75. See Schiff, *supra* note 73, at 341 (observing that the TRC's effect upon impunity appears "mixed" and that, if considered vis-à-vis a weak legal system, it has the merit of having exposed at least violations committed by some perpetrators).

76. See Aukerman, *supra* note 27, at 92; MINOW, *supra* note 15, at 50 (stating that trials should not be pursued "where there is no chance for or perception of fairness or where there are overwhelming disparities between the resources and will needed"). See also Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 367 (2002) [hereinafter Daly, *Punitive and Reconstructive Justice*] (stating that "[a]ny response Rwanda develops not only must be consistent with principles of justice but also be pragmatically feasible," and that "[j]ustice that exists only in theory is no[t] justice at all").

77. Bassiouni, *supra* note 7, at 41-42.

the “social geography” of the society in question, including its demographic composition, dynamic of group relations, and political makeup, should play a central role in the consideration and selection of accountability responses.<sup>78</sup> While some form of retribution for the most paradigmatic abusers seems necessary to avoid trivializing victims’ suffering and to achieve a degree of justice, this will generally not suffice. Far from being mutually exclusive, blended response and mixed policies, including trials for the most paradigmatic violations, public inquiries, mediation, amnesties, and truth commissions, may be more effective in providing a degree of justice and the necessary societal reconciliation.<sup>79</sup>

Rwanda represents an interesting test case where solutions have been creatively devised to remedy shortcomings of the criminal trials paradigm. The Gacaca law adopts an innovative and unique approach by combining the punitive-retributive goals normally associated with criminal trials, with restorative measures promoting reconciliation and rehabilitation. This poses the main question of how to strike the right balance between the backward-looking, reactive nature of retribution, and forward-looking, restorative justice principles.

## VII. JUSTICE IN THE AFTERMATH OF THE GENOCIDE: JUSTICE DENIED

In the aftermath of the genocide, both the international community and the Rwandan government have sought to achieve accountability for unspeakable crimes by way of the Western retributive model of justice embodied in criminal prosecutions. Given the magnitude of the genocide, including the fact that thousands were involved as victims and perpetrators, and the inadequacies and shortcomings characterizing both the international and the domestic trials, the general perception is that justice, accountability, and reconciliation have not been achieved.

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78. See Drumbl, *(Al)lure of Genocide Trials*, *supra* note 39, at 219 (advocating for blended responses and policies to redress genocidal violence); Aukerman, *supra* note 27, at 41. Aukerman questions the applicability of the “ordinary crime” prosecution paradigm to “massive human rights atrocities” involving numerous individuals, and challenges the view that prosecutions are the best way of redressing criminal actions in the context of transitional justice. *Id.* The author concludes that “[We] must first determine the goals of transitional justice, and then decide on the priority to be given to prosecution.” *Id.* at 92. See also Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. L. 143, 288-89 (2001) (stating that “[u]niversal application of a retributive justice model runs the risk of devaluating the importance of context in determining whether such a model will be effective in redressing mass atrocity in the affected society” and that “if retributive justice is implemented without a pre-existing contextual inquiry, a disjuncture might . . . emerge between the imperative to implement trials and the consequences these trials may have on the post-genocidal society”).

79. See Drumbl, *(Al)lure of Genocide Trials*, *supra* note 39, at 219. This heterogeneous approach seems to be confirmed by the Velasquez-Rodriguez judgment, in which the Inter-American Court of Human Rights holistically defined justice to encompass the needs of the victims, as well as the imperative to reform state institutions to prevent future abuses. In that case, the Inter-American Court of Human Rights stated that a state is bound to fulfill the following obligations in response to the commission of a gross violation of human rights: conduct an investigation to establish the truth regarding the violation suffered by the victim and capable of identifying the perpetrators of such violation; prosecute those responsible for the violation; provide reparation or compensation to the victims of human rights violation; take steps to ensure that the violation does not recur in the future. See Velasquez-Rodriguez, Inter-Am. C.H.R. (ser. C) No. 4 (1988).

## VIII. BACKGROUND TO THE GENOCIDE AND POLITICAL CONTEXT

Between April and July 1994, an estimated 800,000 Rwandans<sup>80</sup>—roughly ten percent of the entire population—were ruthlessly massacred in what was a “carefully planned and orchestrated slaughter, coordinated at the highest level of the state.”<sup>81</sup> The genocide was triggered by the assassination of the Rwandan Hutu President Habyarimana on April 6, 1994 when the plane on which he was flying was shot down as it was approaching Kigali airport.<sup>82</sup> Although the country had experienced waves of violence since it obtained independence in 1962,<sup>83</sup> what was strikingly unique to the 1994 aggression were its savage brutality and the extent of the involvement of both victims and perpetrators. Relying on massive government-sponsored propaganda dehumanizing the Tutsi, and on the subservience of Rwanda’s highly hierarchical society, the meticulously planned, efficient genocidal campaign was led by all the main actors within the then Hutu dominated government. These included the Presidential Guard, the Rwandan Armed Forces (RAF), as well as local politicians and administrators whose main task was to mobilize and involve thousands of Hutu citizens in slaughtering their own neighbors.<sup>84</sup> The killings were carried out with the most shocking, sadistic cruelty by using machetes, clubs, axes, knives, grenades, and guns.<sup>85</sup> Those responsible for the violence beat their victims to death, amputated their limbs, buried them alive, raped, and killed them.<sup>86</sup> Victims included women, men, and children, as “[n]o survivors were to be left to tell the story.”<sup>87</sup>

80. A recent census conducted by the Rwandan government reports that 937,000 Rwandans died in the genocide. Integrated Regional Information Networks, *Rwanda: Census finds 937,000 died in genocide*, RELIEFWEB, Apr. 2, 2004, available at <http://www.reliefweb.int/w/rwb.nsf/s/F308B7EC24168C9885256E6A00558A7D> (last visited Oct. 24, 2004). Although the number of victims will never be known with certainty, even the most conservative estimates indicate that over three quarters of the entire Tutsi population were killed. See Organization of African Unity, Rwanda, the Preventable Genocide § 14.80 (July 2000) [hereinafter O.A.U. Report].

81. See RWANDA AND SOUTH AFRICA IN DIALOGUE: ADDRESSING THE LEGACIES OF GENOCIDE AND CRIMES AGAINST HUMANITY 2 (Charles Villa-Vincencio & Tyrone Savage eds., 2001) [hereinafter RWANDA AND SOUTH AFRICA IN DIALOGUE].

82. In the plane crash, the President of Burundi was also assassinated.

83. Prior to the genocide, the population of Rwanda consisted of an estimated 85 percent Hutu, 14 percent Tutsi, and 1 percent Twa. Past ethnic and political divisions between Hutu and Tutsi, fostered and fueled by the colonial “divide and rule” policy, led to large scale massacres mostly perpetrated against Tutsi in 1963 and 1966. See RWANDA AND SOUTH AFRICA IN DIALOGUE, *supra* note 81, at 4-7. About 10,000 Tutsi were killed and 170,000 were driven into exile between 1959 and 1961 when a Hutu supported by the Belgians deposed the Tutsi monarchy. Following several attempts by the Tutsi to overthrow the Rwandese government, some 20,000 Tutsi were massacred. Amnesty International, Rwanda Gacaca: A Question of Justice 4 (Dec. 2002) [hereinafter Amnesty International, *Question of Justice*].

84. The genocide was “so routine, so sustained, that the perpetrators simply called it “work” . . . [it] was—according to its very design—a highly public affair, whose organizers actively sought to enlist in its deadly “work” the maximum possible number of Hutu participants. See Helena Cobban, *The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law*, available at <http://bostonreview.net/BR27.2/cobban.html> (last visited Oct. 24, 2004). See also Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 364 (reporting that an estimated 650,000, about one tenth of the Hutu population, participated in the killings).

85. O.A.U. Report, *supra* note 80, § 14.26.

86. *Id.* §§ 14.26-27.

87. *Id.*

The genocide was stopped only in July 1994, when the Rwandan Patriotic Army (RPA)—primarily composed of Tutsi émigrés in Uganda—took control of Kigali and ousted the Hutu regime, establishing the Rwandan transitional government of National Unity.<sup>88</sup> The government has since been dominated by the main Tutsi party—the Rwandan Patriotic Front (RPF)—whose leader, Paul Kagame, won a landslide victory in elections held in August 2003.<sup>89</sup>

In the aftermath of the genocide, Rwanda was a wrecked country with no functioning institutions or infrastructure. Of the seven million inhabitants before the genocide, about three quarters had been killed, displaced, or fled.<sup>90</sup> The rest were like walking dead, left to grasp with a bewildering reality.

It is in this scenario that the transitional government was confronted with the daunting task of dealing with the masses of alleged perpetrators in an attempt to break the vicious cycle of impunity that had permitted the genocide to happen in the first place.<sup>91</sup> To be effective, any legal response to such broad-based violence needed to achieve the multiple, competing goals of justice, reconciliation, and deterrence. Despite progress in the country's reconstruction since the genocide, Rwanda remains a deeply divided, traumatized society, where ethnic polarization runs high beneath tight government control.

## IX. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Established under Chapter VII of the United Nations Charter in 1994, the International Criminal Tribunal for Rwanda (ICTR) was conceived to bring to justice the most serious perpetrators of the genocide, and other violations of international humanitarian law, by way of an impartial forum that would avoid the perception of victor's justice in Rwanda.<sup>92</sup> With its creation, the international community was to send to the world the unequivocal message that the appalling crimes committed in Rwanda clearly violated international law and would not be tolerated in the future.<sup>93</sup> Finally, it was hoped that trials before the tribunal could ultimately contribute to the process of national reconciliation, the restoration of peace, and the prevention of future genocide in Rwanda.<sup>94</sup>

88. See Drumbl, *Sclerosis*, *supra* note 10, at 288. The RPA is the army of the rebel Tutsi political party Rwandan Patriotic Front. See generally Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases*, 3 J. APP. PRAC. & PROCESS 589, 604 (2001).

89. Paul Kagame, the Tutsi RPF's leader responsible for stopping the 1994 genocide, won 95 percent of the votes. See *Kagame Won, a little too well*, THE ECONOMIST, Aug. 28, 2003, available at [www.economist.com](http://www.economist.com) (last visited Oct. 24, 2004) [hereinafter *Kagame Won*].

90. O.A.U. Report, *supra* note 80, § 17.3.

91. Harrell, *supra* note 10, at 37 (stating that justice was seen both as a moral duty to the survivors and as necessary to break the cycle of impunity while seeking reconciliation).

92. U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). See also Statute of the ICTR, S.C. Res. 955, U.N. SCOR, 3453d mtg., Annex, art. 1-4, U.N. Doc. S/RES/955 (1994).

93. See Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 87, 98-99 (Jane E. Stromseth ed., 2003).

94. Statute of the ICTR, S.C. Res. 955, U.N. SCOR, 3453d mtg., at preamble, U.N. Doc. S/RES/955 (1994).



Significantly, the ICTR was the first international court ever to deliver verdicts in relation to genocide.<sup>95</sup> But, while the tribunal has made some relevant contributions by setting new important legal precedents in the field of human rights and humanitarian law,<sup>96</sup> it has nonetheless been looked upon with growing skepticism, not only by the Rwandan government, but also by some foreign observers.<sup>97</sup> Since its establishment, managerial, administrative and logistical deficiencies have compromised its ability to deliver justice effectively and swiftly.<sup>98</sup> As of September 2004, only nineteen judgments have been handed down involving twenty-three accused.<sup>99</sup> Rwanda's disappointment with the slow pace of justice has been further exacerbated by the realization that the tribunal consumes disproportionately conspicuous resources at the expense of the national judicial system.<sup>100</sup> Recent plans to complete all tribunal's activities by 2010 further contribute to the bitterness felt by many Rwandans vis-à-vis an international community perceived as indifferent to their quest for justice.<sup>101</sup>

The tribunal has also been regarded by the majority of Rwandans as the embodiment of victor's justice, in that it has failed to investigate war crimes committed by the RPF, despite the fact that these fall within its mandate.<sup>102</sup>

Furthermore, the tribunal has been criticized for failing to deliver to its "primary audience"—i.e. the society victimized by the violence.<sup>103</sup> The effectiveness of the tribunal in delivering justice while seeking peace and reconciliation has

95. ICTR, General Information, available at <http://www.ictor.org/default.htm> (last visited Oct. 24, 2004) [hereinafter ICTR, General Information].

96. The ICTR has delivered the first conviction in history of a former head of government, former Prime Minister Kambanda, for genocide; has recognized that rape and sexual violence constitute genocidal acts when committed with the intent to destroy a protected group; and has defined the contour of rape as a crime against humanity. Roman Boed, *The International Criminal Tribunal for Rwanda*, in POST CONFLICT JUSTICE 487, 493 (Cherif M. Bassiouni ed., 2002).

97. Rwanda, at the time a member of the Security Council, was the only country to vote against the resolution establishing the ICTR. Among the reasons for this position, the limited temporal jurisdiction of the ICTR and its refusal to impose the death penalty. See Strain & Keyes, *supra* note 93, at 104-09. For a critique of the ICTR performance, see Drumbi, *(A)lure of Genocide Trials*, *supra* note 39, at 227 (criticizing ICTR proceedings for being slow, very expensive, selective, subject to due process challenges and widely perceived as illegitimate by Rwandans). See also Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, BUFF. HUM. RTS. L. REV. 77, 78-79 (2000) (arguing that the contribution of the ICTR to the protection of human rights as well as the process of peace and normalization inside Rwanda is "marginal, if not entirely irrelevant," and that the tribunal is alien to "political realities and removed from both the individual and national psyches of the victims as well as the victors in the Rwanda conflict").

98. Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 35 (2002).

99. ICTR, Fact Sheet No. 1, The Tribunal at a Glance, available at <http://www.ictor.org/default.htm> (last visited Oct. 24, 2004) [hereinafter ICTR, Fact Sheet No. 1].

100. Former Rwandan General Prosecutor Gerald Gahima, Re-establishing the Rule of Law and Encouraging Good Governance (Sept. 9, 2002) (presented at the 55th Annual DPI/NGO Conference) [hereinafter Gahima] (condemning the manifest bias of the international community towards international mechanisms at the expense of national systems). In 2002-2003, the UN General Assembly allotted to the ICTR a total budget of \$177,739,400. See ICTR, General Information, *supra* note 95.

101. The ICTR first submitted its completion strategy to the UN Security Council in July 2003. According to the plan, ICTR's investigations are due to be completed by the end of 2004, while all trials and appeals are expected to be terminated by, respectively, 2008 and 2010. See ICTR, Fact Sheet No. 1, *supra* note 99.

102. On the jurisdiction of the ICTR, see Statute of the ICTR, S.C. Res. 955, U.N. SCOR, 3453d mtg., at preamble, arts. 1-4, U.N. Doc. S/RES/955 (1994).

103. See Kritz, *Progress and Humility*, *supra* note 13, at 59.

indeed been frustrated by its inaccessibility to ordinary Rwandans. While its location in “neutral” land—Arusha, Tanzania—was to send a message of impartiality, it makes it in fact impractical—if not impossible—for Rwandans to attend court proceedings or hear news of ICTR trials.<sup>104</sup> This, and the virtually total exclusion of victims from the tribunal proceedings, has led some critics to see the tribunal as being largely inaccessible, distant, and as having a minimal and disempowering impact on victims’ lives.<sup>105</sup> It is no surprise, therefore, that Rwandans regard the tribunal as a “foreign and removed body alien in procedure, whose slow pace of trials is proof of UN inefficiency, or worse, indifferent to Rwandan needs.”<sup>106</sup>

Given the limited capability of the ICTR to deliver justice, the Rwandan government has turned to the national judicial system as the principle means to deliver accountability and end the cycle of impunity.

## X. ENDING IMPUNITY IN POST-GENOCIDE RWANDA: THE 1996 GENOCIDE LAW

Despite its almost complete human and physical incapacitation, and the impossible challenge posed by having to deal with the genocide on such a widespread scale, the prosecution of genocide suspects was looked upon by the Rwandan government as the only way of ending impunity and as an essential precondition to achieving stability and reconciliation.<sup>107</sup> This determination was to be faced by a crude reality. In the aftermath of the genocide, the Rwandan provisional government of National Unity was faced with the enormous and urgent challenge of re-building the judicial system virtually from scratch.<sup>108</sup> The events of the spring 1994 had in fact devastated the already limited judicial infrastructure

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104. Strain & Keyes, *supra* note 93, at 107 (reporting that only recently have Rwandans been able to get news from the ICTR in Kinyarwanda, the national language of Rwanda). See Kritz, *Progress and Humility*, *supra* note 13, at 59 (stating that the victim’s groups and local society were long ignored by the two ad hoc international criminal tribunals, and outreach to the local population on their work took years to begin). Some progress is currently being made as the ICTR is currently building a courtroom in Kigali. *Id.*

105. Victims cannot constitute themselves civil claimants in proceedings before the tribunal. Stef Vandeginste, *Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, in *POLITICS AND THE PAST* 249, 53 (John Torpey ed., 2003) [hereinafter Vandeginste, *Victims of Genocide*]. While the statute of the tribunal provides for the possibility that reparation in the form of restitution be ordered in the judgments, this has never happened to date. *Id.* On the other hand, the ICTR has launched, in 2000, an aid program for victims, which includes the provision of legal advice, psychological counseling and rieducation, as well as financial assistance for resettlement. *Id.* See also David Rawson, *Coping with Chaos while Acting Justly: Lessons from Rwanda*, in *EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS* 125, 132 (David Barnhizer ed., 2001) (stating that the ICTR remains “geographically distant and conceptually estranged from the people it purports to serve”).

106. See Ironside, *supra* note 98, at 36.

107. See Jean De Dieu Mucyo (former Rwandan Minister of Justice), *RWANDA AND SOUTH AFRICA IN DIALOGUE*, *supra* note 81, at 49 (stating that the eradication of impunity was a precondition for peace). See also Gahima, *supra* note 100, at 4 (stating that prosecutions were undertaken to address the victims’ demands for justice, issues of accountability and impunity, to foster the rule of law, and to promote peace and reconciliation).

108. See Cara J. Ferstman, *Domestic Trials for Genocide and Crimes Against Humanity: The Example of Rwanda*, 9 *AFR. J. INT’L & COMP. L.* 857, 861 (1997).

and decimated most of its personnel.<sup>109</sup> According to post-genocide statistics, over 80 percent of the country's legal personnel—including judges, prosecutors and magistrates—had either been killed or fled the country following the outbreak of the violence in April 1994.<sup>110</sup> These difficulties were exacerbated by the challenge of establishing the rule of law in a context where none ever existed in the first place.<sup>111</sup>

With the help of the international community, the Rwandan government started the rehabilitation and introduced important reforms of the justice system in a relatively short period of time.<sup>112</sup> Approximately 324 magistrates, 100 deputy prosecutors and 298 judicial police officers and inspectors were trained prior to the reopening of the court system in 1996, though these numbers still fell considerably short of what was needed for the system to operate under normal circumstances.<sup>113</sup> It is in this context that the government of Rwanda proceeded with an unrealistic program of maximum accountability with the aim of prosecuting all those responsible for genocide-related crimes, thus assigning to the justice system an impossible task.<sup>114</sup>

In 1996, the government passed Organic Law No. 08/96 on the organization of prosecution for offenses constituting the crime of genocide or crimes against humanity committed since October 1, 1990.<sup>115</sup> The special legislation was conceived "to bring about justice, retribution, and the end of impunity" by setting up specialized chambers within the ordinary jurisdictions of the first instances courts to try genocide-related cases.<sup>116</sup>

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109. Chris Mburu, Challenges Facing Legal and Judicial Reform in Post-Conflict Environments: Case Study from Rwanda and Sierra Leone 11, 17-18 (July 8-12, 2001) (paper presented at the World Bank Conference "Empowerment, Security and Opportunity through Law and Justice") (reporting the destruction of courthouses and of the most basic legal documents and materials). See William A. Shabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, CRIM. L.F. 524, 533 (1996). See also Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. OF COMP. & INT'L L. 349, 353 (1997).

110. There are different estimates as to the number of legal personnel present in the country at that time. See O.A.U. Report, *supra* note 80, § 18.4 (reporting that there were only five judges in the country and fifty lawyers). But see Mburu, *supra* note 109, at 11 (reporting that out of 750 judges in early 1994, only 244 were left after the genocide; out of 87 prosecutors, 14 were present in post-genocide Rwanda; out of 193 investigators only 39 survived).

111. See Gahima, *supra* note 100, at 2 (stating that the pre-genocide justice administration system was "largely manned by unqualified people . . . judges were appointed on the basis of political patronage, [and that] corruption in the judiciary was rife"). See also Schabas, *supra* note 109, at 531 (reporting that, in 1993, the Rwandan justice system comprised about seven hundred judges and magistrates, of whom less than fifty had any formal legal training).

112. Institutional reforms included the establishment of the Supreme Council of Magistrates and the reestablishment of the Supreme Court, which had been suppressed since 1978. See Amnesty International, *Question of Justice*, *supra* note 83, at 12.

113. *Id.*

114. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 630 (1998) [hereinafter Drumbl, *Lawlessness*].

115. See Organic Law No. 08/96 of Aug. 30, 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, available at [www.preventgenocide.org/law/domestic/rwanda.htm](http://www.preventgenocide.org/law/domestic/rwanda.htm) (last visited Oct. 24, 2004) [hereinafter Genocide Law].

116. See Ferstman, *supra* note 108, at 863 (discussing the Genocide Law).

The law created four categories of offenses and corresponding punishments.<sup>117</sup> Category 1, which carried the death penalty,<sup>118</sup> included those who masterminded the genocide (e.g. the planners, instigators, organizers, and leaders of the genocidal campaign; persons who acted in positions of authority; notorious murderers; and those who committed particularly heinous acts or sexual torture).<sup>119</sup> Category 2, which carried the penalty of life imprisonment,<sup>120</sup> comprised the perpetrators, conspirators, or accomplices of intentional homicide or serious assault resulting in death.<sup>121</sup> Category 3, which carried the penalty of imprisonment for a number of years,<sup>122</sup> comprised persons accused of “other serious” but non-lethal assaults.<sup>123</sup> Category 4 comprised persons who committed offenses against property<sup>124</sup> and must pay civil damages.<sup>125</sup> The specialized justice program established by the Genocide Law also relied heavily on a “fast-track . . . confession procedure.”<sup>126</sup> This offered all perpetrators in the genocide—other than those in Category 1—a substantial sentence reduction subject to a full and detailed confession, a guilty plea and an apology to the victims.<sup>127</sup> This system was conceived to accelerate preliminary investigations, speed up and reduce the number of trials, and enhance reconciliation through public admission of guilt.<sup>128</sup>

## XI. THE RWANDAN GENOCIDE TRIALS: PROBLEMS AND CHALLENGES IN DELIVERING JUSTICE

Since their start in 1996, the Rwandan trials for genocide have been subject to extensive criticism directed at the lack of experience and independence of the judges,<sup>129</sup> as well as their disregard of due process rights.<sup>130</sup> By the end of 2002,

117. Genocide Law, *supra* note 115, arts. 2, 14.

118. *Id.* art. 14.

119. *Id.* art. 2.

120. *Id.* art. 14.

121. *Id.* art. 2.

122. *Id.* art. 14.

123. *Id.* art. 2.

124. *Id.*

125. *Id.* art. 14(d).

126. See Drumbl, *Lawlessness*, *supra* note 114, at 586-87.

127. Genocide Law, *supra* note 115, arts. 4-16. See Morris, *supra* note 109, at 359 (“[a] greater penalty reduction is made available to perpetrators who confess and plead guilty prior to prosecution than to perpetrators who confess only after prosecution has begun”).

128. Lawyers Committee for Human Rights, Prosecuting Genocide in Rwanda: The ICTR and National Trials 51 (1997), at <http://www.humanrightsfirst.org/pubs/descriptions/rwanda.htm#>. See also Morris, *supra* note 109, at 360 (commenting that the requirement of a detailed confession was important for establishing a “truthful historical record” of the genocide, and in facilitating investigations and prosecutions of genocide related crimes).

129. When the trial started, most judges in the Specialized Chambers had no trial experience and little training. See Drumbl, *Lawlessness*, *supra* note 114, at 594. See also Ferstman, *supra* note 108, at 862 (stating that some of the judges presiding over genocide trials were lay persons with only four months training).

130. See Drumbl, *Lawlessness*, *supra* note 114, at 614 (stating that when the trials started in 1996, only 54 percent of the defendants had defense counsel). See also MINOW, *supra* note 15, at 124 (arguing that, rather than ending the cycle of revenge, Rwandan trials were revenge). But see United States Department of State, Country Report on Human Rights Practices: Rwanda (2001) (reporting that, from 1999 through 2002, the vast majority of genocide trial met international fair trial standards) [hereinafter Country Report].

approximately 7,331 persons had been judged on genocide-related charges, mostly through group trials.<sup>131</sup> Although the quality of genocide trials has considerably improved over time, they are still carried out in a highly charged political context and by scarcely qualified personnel.<sup>132</sup> The judiciary continues to suffer from a dearth of resources, inefficiency, corruption, and executive influence.<sup>133</sup> Its "Tut-sification,"<sup>134</sup> coupled with the virtual wholesome impunity of the RPF for war crimes committed during and after the civil war, raises serious questions regarding its legitimacy and impartiality.<sup>135</sup>

The credibility of the domestic system of justice is further called into question by the desperate prison situation in Rwanda. In the aftermath of the genocide, a massive campaign of arrest associated with a dysfunctional judiciary led to the unlawful, prolonged detention of thousands of individuals.<sup>136</sup> As of April 2004, some 80,000 individuals were still detained on genocide-related charges.<sup>137</sup> Due to the overcrowding and the appalling sanitary situation, most prisoners live in life threatening conditions.<sup>138</sup> This grim situation is not likely to drastically change, as even the most optimistic estimates indicate a prison population of 60,000 by 2005.<sup>139</sup>

While the genocide trials have permitted the Rwandan government to individualize culpability for the genocide and to send a strong deterrent message to

131. See Amnesty International, *Question of Justice*, *supra* note 83, at 16 (estimating that, by the end of 2001, only 6 percent of genocide suspects had been tried).

132. *Id.* at 15-16.

133. *Id.* at 13-14. See also Stef Vandeginste, *Rwanda: Dealing with Genocide and Crimes against Humanity in the Context of Armed Conflict and Failed Political Transition*, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 223, 235 (Nigel Biggar ed., 2001) [hereinafter Vandeginste, *Dealing with Genocide*] (reporting that in some cases suspects have been released by corrupting the judges and that this has led to popular vendetta).

134. See Marc Cousineau, *L'établissement de l'Etat de droit au Rwanda: un but irréalisable*, 28 OTTAWA L. REV. 171, 180 (1997) (stating that in 1996, 85 percent of those trained to become magistrates were Tutsi). See also Phillip Reyntjens, *Chronique Politique du Burundi et du Rwanda*, in L'AFRIQUE DES GRANDS LACS ANNUAIRE 1999-2000, at 112 (F. Reyntjens et S. Marysse eds., 2000) (reporting that in 1999, the majority of presidents of tribunals of first instance, court of appeals and Supreme Court were Tutsi, as well as most of the prosecutors); O.A.U Report, *supra* note 80, § 18.38 (stating that, "as virtually all other sectors of Rwandan public life, the justice system was dominated by Tutsi").

135. See Strain & Keyes, *supra* note 93, at 116. See also Press Release, Human Rights Watch, *Rwanda: Deliver Justice for Victims of Both Sides*, Aug. 12, 2002 (reporting that thousands were killed in human rights abuses propagated by the RPF), available at <http://www.hrw.org/press/2002/08/rwanda081202.htm> (last visited Oct. 24, 2004).

136. See Amnesty International, *Question of Justice*, *supra* note 83, at 6-8. See also Country Report, *supra* note 130, § 1(d) (reporting that, in 2001, ninety-five percent of approximately 110,000 individuals detained were awaiting trial on genocide-related charges, the majority of whom had incomplete files).

137. See Amnesty International, *Rwanda: The Enduring Legacy of Genocide and War* (Apr. 6, 2004), available at <http://web.amnesty.org/library/index/engaf470082004> (last visited Oct. 24, 2004) [hereinafter Amnesty International, *Enduring Legacy*].

138. See Commission on Human Rights Report on the Situation of Human Rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, E/CN.4/1999/33, at 30. See also Amnesty International, *Question of Justice*, *supra* note 83, at 8 (reporting 11,000 deaths between 1994 and 2001 due to "preventable disease, malnutrition and the debilitating effects of overcrowding").

139. Peace and Reconciliation in Africa, (Nov. 8-12, 1999) (paper presented at the All-Africa Conference on African Principles of Conflict Resolution and Reconciliation, Addis Ababa, Ethiopia) [hereinafter *Peace and Reconciliation*].

those convicted,<sup>140</sup> they have failed to achieve other equally important goals. As observed by Mark Drumbl, “By focusing on individual guilt or innocence in a situation of broad societal complicity, the importance of collective wrongdoing and the structural causes of the genocide are ignored, if not negated.”<sup>141</sup> According to Drumbl, the trials have also strikingly failed to generate feelings of individual responsibility and guilt among prisoners, with most of them regarding themselves simply as prisoners of war ending up on the losing side.<sup>142</sup> This, coupled with the general distrust of the Tutsi-dominated judicial system, may explain why the trials have failed to produce a full, reliable record of what happened in 1994, despite the thousands of criminal prosecutions undertaken by the Rwandan government.<sup>143</sup> Further, the slow pace, the inaccessibility of court proceedings, and lack of reparation through trials have been of little benefit to the victims.<sup>144</sup> The Rwandan justice system has thus been deemed to be a “lethargic, and arbitrary enforcement procedure” that denies justice to alleged perpetrators and victims alike and hinders the process of reconciliation.<sup>145</sup>

## XII. SEARCHING FOR ALTERNATIVE FORMS OF JUSTICE: THE GACACA JURISDICTIONS

Acknowledging the inability of the ordinary justice system to deal with the sheer number of perpetrators, the Rwandan government started to question the efficacy of a “Western-style, highly individualized prosecutorial approach” and to consider alternative ways of overcoming the judicial impasse.<sup>146</sup> It thus decided to introduce Gacaca jurisdictions to try genocide cases. These consist of a community-based, highly decentralized system of local courts inspired by the traditional dispute resolution mechanism existing in Rwanda since pre-colonial time.<sup>147</sup>

140. Strain & Keyes, *supra* note 93, at 111 (stating that the trials “brought to justice” those responsible for the genocide while exonerating those who did not participate in the eye of the state and, more importantly, of their communities).

141. See Drumbl, *Sclerosis*, *supra* note 10, at 295 (arguing that the simplistic categories of “innocent” or “guilty” created by trials contribute to reinforcing the “dualistic nature” of Rwanda post-genocidal society).

142. Drumbl, *(Al)lure of Genocide Trials*, *supra* note 39, at 227-28. Several observers have noted that Hutu prisoners usually deny the genocide ever happened and refer to the events taking place between April and July 1994 as the civil war. *Id.* at 228.

143. See Drumbl, *Sclerosis*, *supra* note 10, at 295 (quoting Carrie Gustafson, *International Criminal Courts: Some Dissident Views on the Continuation of War by the Penal Means*, 21 HOUS. J. INT’L L. 1, 26 (1998)).

144. See Vandeginste, *Dealing with Genocide*, *supra* note 133, at 237 (stating that victims are often unaware that court hearings are taking place, and that the process of obtaining certificates and of estimating the damage is cumbersome and expensive for them). See also Vandeginste, *Victims of Genocide*, *supra* note 105, at 256-57 (although compensation for victims has been awarded in 50 percent of civil verdicts, in none of these cases were the verdicts awarded against the state or against those found criminally guilty).

145. Drumbl, *Lawlessness*, *supra* note 114, at 600.

146. See Cobban, *supra* note 84, at 8-10. See also African Rights, *Gacaca Justice: A Shared Responsibility* 1 (Jan. 2003) [hereinafter *African Rights*] (estimating that, at the current pace, it will take about twenty years to complete genocide-related trials).

147. Reyntjens, *supra* note 134, at 95. According to the government, the new Gacaca jurisdictions rely on the use of arbitration traditionally embodied in Gacaca to achieve goals of retribution, rehabilitation of victims, reconciliation and construction of a “new Rwandan national identity.” See Cobban, *supra* note 84, at 11 (citing Richard Sezibera, Rwandan Ambassador); Gahima, *supra* note 100 (speak-

While the new system was primarily conceived to remedy the slow pace with which justice was being meted out by the ICTR and the domestic courts, it also purported to respond to their lack of inclusiveness by engaging individuals and communities in the process of justice and reconciliation.<sup>148</sup> The Gacaca jurisdictions—which have been promoted by the government as a synthesis of the traditional Gacaca and a formal, Western-style court system—are expected to have an approximate lifespan of five to eight years.<sup>149</sup>

### XIII. THE ROLE OF TRADITIONAL GACACA

In its original form, Gacaca is an informal, community-based, localized system of dispute resolution that has ancient roots in Rwanda, with origins in pre-colonial times.<sup>150</sup> Acting as a “local healing . . . mechanism that is cheap and accessible,” Gacaca’s indigenous forums are used by villages’ inhabitants as an alternative to the formal state courts to resolve minor disputes arising among them.<sup>151</sup> Gacaca is an expression of the culture and reflects the close-knit nature of rural communities from which it originated.<sup>152</sup> It operates on an informal, ad hoc basis, through meetings convened whenever the need arises.<sup>153</sup> Traditionally, unless women are a party to the conflict, only male adults take part in the meetings which are chaired by respected community elders, acting as arbitrators.<sup>154</sup> Gacaca embodies restorative justice principles because it does not seek to achieve justice by punishing the perpetrator, but to restore social order by finding communal, compromised solutions, and by reintegrating the offender within the community.<sup>155</sup> As with other African traditional dispute resolution systems, Gacaca aims

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ing of “extraordinary laws” to respond to an “extraordinary event”—i.e. the genocide); *Rwandan To Resurrect Traditional Justice System*, AGENCE FRANCE PRESSE, June 17, 2002, available at [www.globpolicy.org/intljustice/general/2002/0617ga.htm](http://www.globpolicy.org/intljustice/general/2002/0617ga.htm) (last visited Dec. 9, 2004).

148. Strain & Keyes, *supra* note 93, at 117. See also *On a Patch of Grass*, THE ECONOMIST, May 17, 2003, at 42 (characterizing Gacaca as “rough, cheap and the main means of Hutu-Tutsi reconciliation”).

149. *Genocide Suspects’ List to Swell to Over 500,000*, HIRONDELLE NEWS AGENCY, Sept. 2, 2004, available at <http://www.hirondelle.org/arusha.nsf/0/4E338483245F4F2D43256F04005708F8?OpenDocument> [hereinafter *Genocide Suspects’ List*].

150. See Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 370-71. In many African countries, colonial powers introduced their own system of courts while allowing indigenous systems of dispute resolution to continue operating. This resulted in a dual, parallel system of laws and courts called legal pluralism. Penal Reform International, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems* 51 (2000) [hereinafter *Access to Justice*].

151. See Sarkin, *supra* note 78, at 159-60.

152. Informal dispute resolution mechanisms generally exist in small, rural communities dominated by “multiplex relationships,” i.e., “relationships which are based on past and future economic and social dependence, and which intersect ties of kinship.” In such communities a dispute between two individuals is perceived as a conflict belonging to the whole community. See *Access to Justice*, *supra* note 150, at 22.

153. Stef Vandeginste, *Justice, Reconciliation and Reparation after Genocide and Crimes against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda* (Nov. 8-12, 1999 Addis Ababa) (paper presented to the All Africa Conference on African Principles of Conflict Resolution and Reconciliation) [hereinafter Vandeginste, *Justice*].

154. *Id.* at 15, 17.

155. *Id.* at 15. See also *Peace and Reconciliation*, *supra* note 139, at 7 (stating that arbitrators’ decisions are based more on the “need to restore social harmony rather than ascertaining innocence or guilt”).

at restoring peace and social harmony within the community affected by the conflict.<sup>156</sup> Although most of the disputes dealt with by Gacaca have a civil nature, some conflicts amounting to minor criminal offenses are also referred to it, resulting not in a criminal sanction but in some sort of civil settlement.<sup>157</sup> Conflicts dealt with by Gacaca include disputes over land use and land rights, cattle, marriage, inheritance rights, loans, damage to properties or animals, theft, as well as light bodily injuries.<sup>158</sup> Reflecting its restorative, reconciliatory nature, the sentences it imposes must be accepted by all of the parties involved.<sup>159</sup> In cases where an agreement between the parties cannot be reached, the case can be referred to the local "Cantonal Tribunal." Gacaca meetings have over time become more formalized, being held at regular intervals and with local administrative authorities sometimes acting as arbitrators in the dispute.<sup>160</sup> Although most Gacaca forums ceased to operate during the 1994 genocide, they were reinstated shortly thereafter and are currently active in many areas of the country.<sup>161</sup>

#### XIV. THE CONTEMPORARY GACACA: BETWEEN TRADITIONAL AND STATE JUSTICE

Faced with the slow pace of justice in the aftermath of the genocide, the Rwandan government devised a creative solution by reviving and adapting the traditional Gacaca system of informal dispute resolution to try genocide-related cases.<sup>162</sup> The Gacaca courts are village-based, quasi-judicial forums designed to complement and remedy the failure of the classical system of justice by achieving multiple, ambitious goals.<sup>163</sup> These consist of the reduction of delays in the overburdened criminal justice system, the uncovering of the truth, and the achievement of justice and reconciliation through a highly participatory strategy.<sup>164</sup> In a unique way, Gacaca are set to do so by means of retributive and re-integrative measures.

By involving ordinary Rwandans in the process of justice, Gacaca is based on the assumption that the offenses "were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators."<sup>165</sup> Under the new system, genocide trials take place in the afflicted communities "for whom reconciliation is

156. *Access to Justice*, *supra* note 150, at 24.

157. See Fillip Reyntjens, *Le Gacaca ou la justice du gazon au Rwanda*, 40 POLITIQUE AFRICAINE 34 (1990).

158. *Id.*

159. See Vandeginste, *Justice*, *supra* note 153, at 15.

160. *Id.* at 16.

161. Jennifer Widener, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 66 (2001). See also *Access to Justice*, *supra* note 150, at 78-79.

162. See African Rights, *supra* note 146, at 1 (stating that the traditional Gacaca system "was shaped to suit the needs of contemporary Rwanda").

163. On the failures of the formal justice system to deliver justice, see Gahima, *supra* note 100, at 6 (acknowledging the limited number of Rwandan courts; the cumbersome procedures; the slowness of the system; the impossibility to participate in the judicial process of the society at large).

164. Manuel Explicatif sur la Loi Organique Portante Creation des Jurisdictions Gacaca 8, Cour Supreme (Departements de Jurisdictions Gacaca).

165. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, at preamble.



not an abstract goal but a constant daily struggle.”<sup>166</sup> Unlike the formal justice system and the ICTR, Gacaca jurisdictions operate in the absence of legally qualified judges, prosecutors, and legal counsel.<sup>167</sup>

The recourse to the traditional Gacaca as an ad hoc mechanism to complement the ordinary justice system was first proposed in 1998 by a Commission largely composed of members of parliament, prefects and representatives of the Ministry of Justice.<sup>168</sup> Although studies conducted in the phase of conceptualization of the Gacaca jurisdictions indicate that they were widely supported by Rwandans,<sup>169</sup> real understanding about their functioning appeared to be very limited, with individuals who are the most knowledgeable about the law expressing skepticism regarding the courts’ effectiveness in trying genocide cases.<sup>170</sup>

## XV. ORGANIZATION, JURISDICTION AND POWERS OF THE GACACA JURISDICTIONS

First adopted by the Rwandan Transitional Assembly in January 2001,<sup>171</sup> the law devising and regulating the Gacaca courts system was recently amended by Organic Law No. 16/2004 of 19/6/2004 (Gacaca law).<sup>172</sup> Following a two year pilot phase in which Gacaca courts were established and operated on a circumscribed basis,<sup>173</sup> the amended version of the Gacaca law addresses some of the system’s shortcomings by streamlining and simplifying the Gacaca process and by reducing the overall number of judges involved in it.<sup>174</sup> The Gacaca law estab-

166. See Strain & Keyes, *supra* note 93, at 118.

167. Amnesty International, *Question of Justice*, *supra* note 83, at 37.

168. See Vandeginste, *Justice*, *supra* note 153, at 1.

169. According to a survey, conducted in 2000, by a Rwandese NGO, 93 percent of the Rwandese population was in favor of establishing the Gacaca jurisdictions to try genocide related cases and considered them to be the appropriate instrument to promote national reconciliation. See Special Gacaca, LE VERDICT No. 15/16, July 2000. But see Sarkin, *supra* note 78, at 160 (reporting that at least one group, the Rally for the Return of Refugees and Democracy in Rwanda, has rejected the Gacaca courts); Vandengiste, *Justice*, *supra* note 153, at 14 (reporting that a sociological enquiry conducted in 1996 indicated that people generally rejected the use of traditional Gacaca to deal with the genocide cases).

170. See S. GABISIREGE & S. BABALOLA, PERCEPTIONS ABOUT THE GACACA LAW IN RWANDA: EVIDENCE FROM A MULTI-METHOD STUDY 11 (Johns Hopkins Univ. Sch. of Public Health, Center for Communications Programs 2001).

171. Organic Law No. 40/2000 of 26/01/2001, *supra* note 3 (setting up the “Gacaca jurisdictions” and organizing prosecutions for offenses constituting the crime of genocide or crimes against humanity committed between Oct. 1, 1990 and Dec. 31, 1994).

172. Organic Law No. 16/2004 of 19/6/2004, *supra* note 4 (establishing the organization, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between Oct. 1, 1990 and Dec. 31, 1994).

173. See Hirondele News Agency, *Gacaca Tribunals Officially Launched in Rwanda*, June 24, 2004 (reporting that the 751 Gacaca courts involved in the pilot phase have so far collected information on the genocide in their respective communities, classified the alleged perpetrators, and completed lists of the victims), available at <http://hirondele.org/arusha.nsf/English?OpenFrameSet> (last visited Oct. 24, 2004).

174. The June 2004 amendments reduced the overall number of Gacaca judges from 258,209 to 169,400; reduced the number of judges on each Gacaca bench from 19 to 9; eliminated the two highest levels of Gacaca courts as established by Organic Law No.40/200 of 26/01/2001, namely those at the district and the province level; and introduced measures to protect the identity of rape victims. See IRIN News, *Rwanda: Traditional Courts Inaugurated*, June 24, 2004, available at [www.irinnews.org/](http://www.irinnews.org/)

lishes a hierarchical system of “Gacaca courts” in the country’s two lowest administrative units—notably the cell and the sector—and introduces a Gacaca court of appeal in each sector.<sup>175</sup> The Gacaca courts are supervised and coordinated by the newly established National Service.<sup>176</sup> The new law classifies genocide suspects into three categories according to the degree of their responsibility and the seriousness of the crimes they committed, and confers on the Gacaca courts the competence to try middle-low level suspects in Categories 2 and 3.<sup>177</sup> Category 2 includes perpetrators and accomplices of homicide and other serious attacks causing death; those who injured or attempted to kill their victims; as well as those who committed assaults without the intention to kill.<sup>178</sup> Category 3 includes those suspected of having committed offenses against property.<sup>179</sup> Category 1 suspects—which includes the instigators and organizers of the genocide, notorious murderers, rapists and those who committed acts of torture against their victims—will continue to be tried by the ordinary courts.<sup>180</sup> General assemblies at the cell and sector level (composed of all adult residents in the respective communities) elect nine adults of “integrity” from within themselves to serve as “judges” in the Gacaca courts, and five deputies.<sup>181</sup> Gacaca judges are not required to possess any legal qualifications.<sup>182</sup> The Gacaca courts combine the powers of the prosecution and of the ordinary tribunals. At the cell level, the general assembly exercises the functions of a prosecutor: it identifies the crimes, the victims, the alleged perpetrators and gives evidence to the bench.<sup>183</sup> On the basis of this information, the bench compiles lists of the cell’s residents, victims, and suspects; gathers evidence and testimonies; makes all necessary investigations; and receives confessions, guilty pleas and apologies.<sup>184</sup> In order to conduct hearings, Gacaca jurisdictions are vested with powers similar to those conferred upon ordinary criminal tribunals.<sup>185</sup> Gacaca benches at the cell level determine the categorization of all sus-

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report.asp?ReportID=41860 (last visited Oct. 24, 2004) [hereinafter IRIN News, *Traditional Courts Inaugurated*].

175. Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, arts. 3-4. Each Gacaca court is composed of three organs: a General Assembly, a Seat (or bench), and a Coordination Committee. *See id.* art. 5.

176. *Id.* art. 50.

177. *Id.* art. 2. A previous version of the Gacaca law classified genocide suspects into four categories in accordance with the 1996 Genocide Law (Organic Law No. 08/96 of August 30, 1996), and conferred on the Gacaca courts the task to try Category 2-4 suspects. *See* Organic Law No. 40/2000 of 26/01/2001, *supra* note 3, art. 51.

178. Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, art. 51(2).

179. *Id.* art. 51(3).

180. *Id.* art. 51(1).

181. *Id.* art. 13. The General Assembly for the Sector level elects, within itself, nine persons of integrity and their five deputies to make up the Seat both of the Gacaca court of appeal, and of the Gacaca court of the sector. *See also id.* art. 8.

182. *See id.* art. 14. According to this provision, Rwandans of “integrity” who are at least twenty-one years of age can be elected as Gacaca judges under condition that they have not participated in the genocide; are free from the spirit of “sectarianism”; have not been sentenced to a penalty of at least six months of imprisonment; are of high morals and conduct, truthful and honest; and are characterized by a spirit of speech sharing.

183. *Id.* art. 33. *See also* Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 373.

184. *Id.* art. 34.

185. *See id.* art. 39. Benches at the cell level may compel testimony, order searches, take temporary protective measures against the property of those accused of genocide, sentence the convicted person to pay compensation, summon the alleged perpetrators, and order detention or release on parole where necessary. *Id.*

pects who lived in the cell during the genocide; try suspects of the least serious crimes, those against property (Category 3 suspects); and forward Category 1 and 2 suspects' files to, respectively, the public prosecutor and Gacaca courts at the sector level.<sup>186</sup> Category 2 suspects are tried by the sector-level Gacaca courts.<sup>187</sup> The Gacaca law offers strong sentence reductions as an incentive to confess, and the possibility to commute half of the defendant's sentence into community service.<sup>188</sup> Gacaca hearings are public, except for rape related proceedings and other exceptional cases in which hearings are conducted in camera.<sup>189</sup> The Gacaca law prescribes penalties for individuals who refuse to testify and for those who have threatened or otherwise exercised illicit forms of pressure on witnesses.<sup>190</sup> The Gacaca jurisdictions can impose sentences as severe as thirty years of imprisonment for Category 2 defendants who have killed or attempted to kill their victims and refuse to confess, whereas Category 3 defendants can only be ordered to pay civil compensation for damages to victims' property.<sup>191</sup> Under the law, there is a limited right of appeal only for Category 2 defendants; a right to present opposition against a sentence for those against whom the latter has been pronounced in absentia; and a right to obtain review of a judgment in circumscribed cases.<sup>192</sup> The new system started to be implemented throughout Rwanda in June 2004, following a two-year pilot phase that involved 751 of the nation's 9,010 Gacaca jurisdictions.<sup>193</sup> After considerable delays on the initial government's timeline, thousands of cases are now ready to be tried by the 169,400 popularly elected judges.<sup>194</sup>

## XVI. A CRITIQUE OF THE NEW GACACA JURISDICTIONS: PROSPECTS AND CHALLENGES

The new Gacaca jurisdictions represent an innovative, attractive blend between retributive and restorative justice. While acknowledging that, to a certain extent, justice in the form of punishment is indispensable to help victims come to terms with the past, the participatory and restorative nature of the Gacaca process

186. *Id.* art. 34(6)(7)(9)(10). *See also id.* art. 41.

187. *Id.* arts. 36(4), 42.

188. *Id.* art. 73. Confessions can be made at any stage during the proceedings. Sentence reductions are greatest when the confession is done before the name of the suspect appears on the list of accused compiled by Gacaca benches at the cell level. For example, Category 2 suspects accused of murder or attempted murder who do not confess incur a prison sentence ranging from twenty-five to thirty years of imprisonment; this sentence is reduced to twelve to fifteen years in case of confession after the name of the accused appears on the list, down to seven to twelve years where the confession is made prior to the appearance of the name on the list of accused persons. *Id.*

189. *Id.* arts. 38, 21.

190. *See id.* arts. 29, 30. According to art. 29, every Rwandan citizen has a "duty to participate" in Gacaca courts activities, and persons who omit or refuse to testify can be prosecuted by Gacaca courts and be sentenced to up to one year imprisonment. *Id.* art. 29.

191. *Id.* arts. 73-74. If the author of the offense and the victim have reached an amicable settlement, either privately or before the public authority or other witnesses, prosecution of the former is banned. *See id.*, art. 51.

192. *Id.* art. 85.

193. *See IRIN News, Traditional courts Inaugurated, supra* note 174.

194. According to some sources, Gacaca trials are scheduled to begin in January 2005. *See Hiron-delle News Agency, Beginning of Gacaca trials moved to 2005*, Sept. 21, 2004, available at <http://fr.allafrica.com/stories/200409210921.html> (last visited Oct. 24, 2004).

makes it an instrument potentially suitable to uncover the truth and foster sustainable peace and reconciliation in the long term. While laudable, both goals are fraught with challenges.

## XVII. GACACA JURISDICTIONS AS ACCESSIBLE, PARTICIPATORY, RESTORATIVE JUSTICE

In the face of divisive genocide trials that have prolonged the determination of accountability, Gacaca holds the promises of a system geared towards societal justice and reconciliation.<sup>195</sup>

The new system presents the advantage of dispensing with many of the cumbersome, time-consuming procedures and formalities characterizing conventional trials.<sup>196</sup> Its functioning does not require the intervention of qualified, professional lawyers and judges, but instead relies exclusively on lay judges with a minimum of training, and the communities they represent.<sup>197</sup> The extensive network of Gacaca courts throughout the country makes it possible for the bulk of genocide trials to be held on a large scale and in several places simultaneously.<sup>198</sup>

Procedural simplicity and the speedy disposal of cases may appease the quest for justice of genocide victims and suspects alike because it would send the message that justice is being done. For the rural communities most affected by the genocide, the highly decentralized system of local courts seems to remedy the feeling of alienation caused by geographic distance, technicalities, and lack of communication vis-à-vis the genocide trials conducted to date by the ICTR and the specialized chambers.<sup>199</sup> From the suspects' view, those who have been locked up in horrible prisons for years will at last appear before a jury of their

195. Strain & Keyes, *supra* note 93, at 118.

196. Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 375 (generally discussing the January 2001 version of the Gacaca law. The same observations apply to the 2004 amended version of the Gacaca law).

197. *See id.*

198. *Id.* By introducing Gacaca courts and decentralizing the process of justice, the Rwandan government had initially hoped to drastically reduce the court caseload, the enormous prison population, and to speed up the trials. According to initial government estimates, with the operation of Gacaca, approximately 110,000 prisoners would have been turned over from the formal justice system to the new courts. *See RWANDA AND SOUTH AFRICA IN DIALOGUE*, *supra* note 81, at 42. These predictions have soon proven to be unrealistic, and there are currently widespread concerns, among the government and observers alike, about the "multiplying effect" that the Gacaca process might have on the number of genocide cases. *See Genocide Suspects' List*, *supra* note 149 (reporting that, contrary to initial government estimates, the number of suspects might increase from about 100,000 to 500,000-600,000 as a result of the Gacaca process. Out of this number, some 50,000 are expected to be tried by the ordinary courts. Despite these estimates, the Rwandan government still maintains that all genocide trials will be completed in a period between five and eight years).

According to a 2004 report by Amnesty International, the 32,000 confessions received by the Ministry of Justice by the end of 2002 incriminated an additional 250,000 individuals. *See Amnesty International, Enduring Legacy*, *supra* note 137. As of March 2004, there have been 32,000 additional confessions, likely to implicate many more individuals. *Id.* Finally, the few Gacaca courts that have operated during the pilot phase have also identified thousands of new genocide suspects, foreshadowing a "logistical nightmare" that Gacaca will most likely be unable to tackle. *Id.* *See also* Lars Waldorf, Human Rights Watch Country Representative for Rwanda, Panel Discussion at the presentation of the film "Gacaca: Living Together again," Washington, D.C., (June 3, 2003) (estimating that 100,000 to 250,000 new incriminations may possibly follow the introduction of gacaca).

199. *See Ironside, supra* note 98, at 48-49.

peers, rather than having to face courts deemed to be the expression of victor's justice.<sup>200</sup> Further, the Gacaca law introduces the possibility for victims to obtain reparation for the harm suffered in the form of compensation by allowing them civil intervention in the course of Gacaca proceedings, while at the same time acknowledging their status as victims.<sup>201</sup>

Aside from dramatically increasing access to justice for all parties involved, the Gacaca jurisdictions hold the promises of other important goals. The new state-mandated jurisdictions are characterized by an appealing, highly participatory approach, where participation is seen as the only sustainable way to achieve longer-term peace and societal transformation.<sup>202</sup> Despite being a state creation, the new system delegates as much power as possible to ordinary people in their communities, a fact that may enhance the trust people have in the process and its outcomes.<sup>203</sup> The trials indeed take place "at the heart of the community,"<sup>204</sup> with ordinary Rwandans actively involved in the process by electing and acting as judges, collecting and processing information, and gathering evidence in what is a collectively shared and experienced search for justice and truth.<sup>205</sup> Similar to what has been observed for the South African TRC, it is the process that matters, not just the result. Public hearings that gather the testimony of perpetrators and victims alike become crucial both "as communal experiences and as sources of information."<sup>206</sup> Reflecting its restorative approach, truth in Gacaca emerges communicatively in a dialogue involving all community members, including victims, offenders, supporters and other interested parties. Importantly, victims and survivors of unspeakable crimes are potentially given the opportunity to play a central

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200. *Id.* at 50.

201. On the right to reparation under Gacaca, see Vandeginste, *Victims of Genocide*, *supra* note 105, at 258, 263 (referring to the task conferred upon Gacaca judges of determining the damages to be awarded in each judgment in accordance with a scale foreseen under the law creating the Compensation Fund). The Fund will be responsible for the implementation of this part of the verdict, and will be financed by annual contribution from the state budget, as well as voluntary contributions from foreign countries and profit from community service work. *Id.* Compensation will be made either in cash or through actions and interventions to benefit the beneficiary. *Id.* In 1998, a National Fund for Assistance to Survivors of Genocide was also established with the task to assist the most vulnerable survivors. *Id.* This measure has mostly proven ineffective due to instances of misappropriation and embezzlement involving the fund's administrators. *Id.*

202. Strain & Keyes, *supra* note 93, at 121. See Daly, *Transformative Justice*, *supra* note 27, at 178-79 (stating that Gacaca has the potential to transform the Rwandan society because it addresses the very deficiencies in the country's social and political fabric that allowed the genocide to happen). According to Daly, "Whereas that society was characterized by a highly centralized administration, the gacaca process will be localized. Law [then virtually absent] will make its comeback in a highly feasible and accessible way . . . [with] people . . . control[ing] the process and the outcome." *Id.* See also Ironside, *supra* note 98, at 49 (observing that the new Gacaca, unlike its original form, provides also for the participation of women, many of whom were elected as judges). This is particularly important given that women have suffered the heaviest repercussions as a result of the genocide. *Id.*

203. Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 376-77 (stating that, "Rwandans of all stations will literally be defining justice . . . rather than having it defined for and imposed on them"). See also Harrell, *supra* note 10, at 60 (observing that the greater legitimacy of local forums is likely to be pronounced in dualist postgenocidal societies, which are frequently suspicious of the central government).

204. African Rights, *supra* note 146, at 2.

205. See Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 376.

206. MINOW, *supra* note 15, at 127-28 (discussing benefits of truth commissions). See Vandeginste, *Victims of Genocide*, *supra* note 105, at 260-61 (describing the participatory nature of Gacaca process as amounting to a form of reparation both for victims of the genocide and their communities).

role in Gacaca, challenging those who inflicted pain upon them. Community dialogue may also provide an opportunity to affirm and discuss—and perhaps change—societal norms in a public and participatory setting, even in a context where “social relations and acted-out values have been massively distorted.”<sup>207</sup> This is critically important in Rwanda, where the “moral tone of the community” has been tainted by widespread and horrendous crimes.<sup>208</sup> In Rwanda the violence did not arise out of anarchic chaos, but was largely driven by the shared conviction, fostered by the government’s propaganda of ethnic hatred, that the Tutsi had to be eliminated for the country to become a better place.<sup>209</sup>

Holding trials at the local, grassroots level empowers ordinary people to pursue justice, and could encourage the perpetrators—who are judged by their peers and within their communities—to contribute to the search for truth, with a potentially “cathartic . . . effect on fragmented communities.”<sup>210</sup> For those who confess to, and acknowledge, their crimes before Gacaca, community shaming may have potential re-integrative effects, given the interdependence and close-knit nature of the Rwandan community.<sup>211</sup> Unlike the South African experience with the TRC, confessions in Gacaca need to be accompanied not only by full disclosure of the facts, but also by an apology to the victims, thus possibly helping them to achieve a sense of closure.<sup>212</sup>

The restorative aspects of Gacaca enable perpetrators of the genocide “to make amends for their actions in a way that establishes a human relationship between them, victims and others in the community.”<sup>213</sup> Returning perpetrators to face shaming by their own communities, communities made up not only by victims, perpetrators and their respective supporters, but also by those who opposed, or were ambivalent about, the violence, may exercise a considerable pressure on the perpetrators and thus deter recidivism.<sup>214</sup> It may also promote moral education of the perpetrators and their communities. Taking these individuals back to destroyed communities, and confronting them with the harm they have inflicted, thus humanizing it, may further break down the widespread societal complicity while preventing future violence.<sup>215</sup> Although this process may not always be easy or possible, it may still be more effective than criminal trials, the main result

207. Stovel, *supra* note 40, at 9.

208. *Id.* (reporting that First National healing circles in Hollow Water, Manitoba, led to the detection and acknowledgment of widespread social abuse within the community and to the latter capacity to address the problem and reaffirm positive values).

209. See Drumbl, *(Al)lure of Genocide Trials*, *supra* note 39, at 220.

210. Ironside, *supra* note 98, at 49 (stating that “by bringing victims and perpetrators face to face to tell their stories [Gacaca] will . . . create moral pressure on perpetrators to confess to their crimes and seek forgiveness” and that “the confession itself will be an important source of justice for victims”). See also Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 376 (stating that trials by the Gacaca jurisdictions may “replace the divisive experience of the genocide with the cohesive experience of securing justice”).

211. See Drumbl, *(Al)lure of Genocide Trials*, *supra* note 39, at 222-23.

212. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, art. 54 (requiring those resorting to the “procedure of confession, guilty plea, repentance and apologies” to address apologies “publicly” to the victims in case they are still alive and to the Rwandan society).

213. Stovel, *supra* note 40, at 7 (generally referring to restorative justice benefits for offenders).

214. Drumbl, *(Al)lure of Genocide Trials*, *supra* note 39, at 222-23 (discussing John Braithwaite’s theory on reintegrative shaming and its potential relevance in the context of the highly interdependent Rwandan society).

215. *Id.*

of which seems to be to encourage prisoners' persecutory feelings, far from creating any remorse or shame for what they have done. Instilling shame on offenders, rather than imposing guilt on them, may in turn fortify communities, favoring peace and reconciliation in the long term.

By potentially encouraging participants to reveal more contextual information than conventional trials do, Gacaca may also well contribute to establish an historical record of the genocide and its causes well beyond the imperfect, partial versions of truth furnished by the ICTR and the specialized chambers.<sup>216</sup> "Information that would be ruled irrelevant in legalistic criminal trials [may potentially be] very relevant for healing victims, offenders, and their communities, and [for] addressing the social or systemic conditions that led to, or enabled the [genocide to happen]."<sup>217</sup> This truth may be passed on from generation to generation within each and every community, replacing partisan versions of the same tragedy. While, in the most optimistic scenario, Gacaca will involve the entire community in truth-telling, shaming of perpetrators, and broad discussion about the underlying causes of the genocide—in the least, and despite its potential failure—it may uncover the truth in individual situations.<sup>218</sup>

Unlike trials before the ICTR and the specialized chambers, Gacaca is explicitly designed to achieve reconciliation.<sup>219</sup> This is crucial, given that Rwanda is a "dualist post-genocidal society," one in which victims and aggressors must unavoidably coexist, living geographically intermingled and in close economic interdependence.<sup>220</sup> It is also important in the face of trials that are seen as exasperating social division and prolonging the determination of accountability. By bringing justice at the local level—which is where the most people, especially in the rural communities, experienced the genocidal violence—justice becomes visible, by facilitating a process of coming to terms with the past through the emergence of truth.<sup>221</sup> This in turn, may favor the minimum indispensable degree of reconciliation necessary for communities to continue to coexist, in a context where reconciliation is not an option, but a necessity.<sup>222</sup> If successful, the maximum involvement of individuals would not only make them contribute to a process of "national and historical significance . . . but could also strengthen community ties by fostering mutual cooperation."<sup>223</sup>

Gacaca provides both moral and practical incentives for perpetrators to confess their crimes and seek forgiveness, as well as the ability to flexibly fashion

216. See Strain & Keyes, *supra* note 93, at 125 (observing that, despite the informal nature of Gacaca, its truth-telling aspect cannot be underestimated in a country with an important oral tradition). The Rwandan government hopes that Gacaca trials will help find out how many died in the genocide with more accuracy. See IRIN, *Rwanda: Census finds 937,000 died in genocide*, April 2, 2004, available at [www.allafrica.com](http://www.allafrica.com) (last visited Oct. 24, 2004).

217. Stovel, *supra* note 40, at 9 (discussing benefits of restorative justice).

218. See Drumbl, *Sclerosis*, *supra* note 10, at 301.

219. Strain & Keyes, *supra* note 93, at 125.

220. Drumbl, *(A)lure of Genocide Trials*, *supra* note 39, at 220.

221. Idi T. Gaporayi, *Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the Gacaca Tribunals*, 1 AFR. H.R. L.J., 78, 104 (2001).

222. Daly, *Transformative Justice*, *supra* note 27, at 168-69 (arguing that it is at the local level that the hard work of reconciliation needs to be done, and that it is up to the communities to "make sense of what happened" and to find a way of leaving together again).

223. *Id.* at 177.

sentences and remedies.<sup>224</sup> Category 2 suspects who confess can in fact choose to spend half of a considerably reduced sentence by performing community service.<sup>225</sup> This will include administrative tasks, maintenance of public buildings, construction of schools, roads, and community buildings, crop cultivation, education, and first aid activities.<sup>226</sup> Again, performing activities in the interest of victims and the community as a whole may provide perpetrators with an opportunity to compensate the victim and others harmed for the damage done, as well as facilitate their gradual reintegration into the community.<sup>227</sup>

### XVIII. DUE PROCESS AND HUMAN RIGHTS CONCERNS

Far from embodying a pure restorative philosophy, Gacaca also delivers justice in its most traditional form, through punishment and retribution. Because of this, it has been extensively criticized by some human rights observers on the ground that it restricts international fair trial standards that the Rwandan government is bound to respect under the international and regional conventions it has ratified.<sup>228</sup> Such standards, it is argued, should apply to the Gacaca jurisdictions for a combination of reasons. First, despite the participation of lay judges, Gacaca courts have been created through state legislation and are vested with many of the same powers as ordinary courts (including trying cases as serious as murder and imposing severe criminal sentences); second, they are called upon to apply state legislation; third, enforcement of decisions and supervision of the Gacaca courts is carried out through the state machinery.<sup>229</sup> Some observers have expressed fears that, as currently conceived, Gacaca will amount to an “expedited criminal justice process . . . without the requisite due process safeguards.”<sup>230</sup> The lack of respect of fair trial standards could arguably weaken the very democratic foundation of the system by undermining its legitimacy and credibility.

### XIX. COMPETENCE, INDEPENDENCE AND IMPARTIALITY OF GACACA JUDGES

The right to be tried by a “competent, independent and impartial tribunal established by law” is guaranteed under the International Covenant on Civil and

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224. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, arts. 72-73. Category 1 suspects who choose to confess and apologize can see their death or life imprisonment sentence commuted into long prison terms, *see id.* art. 72. See also Drumbl, *Sclerosis*, *supra* note 10, at 301.

225. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, arts. 51, 73.

226. See Vandeginste, *Victims of Genocide*, *supra* note 105, at 261.

227. *Id.* (describing aspects of the draft presidential decree foreseeing the creation of Committees for Community Service at the national, provincial and local level).

228. See Press Release, Amnesty International United Kingdom, Rwanda: Gacaca Tribunals Must Conform With International Fair Trial Standards (Dec. 17, 2002), available at [www.amnesty.org.uk/news/press/14258.shtml](http://www.amnesty.org.uk/news/press/14258.shtml) (last visited Oct. 24, 2004); Leah Werchick, *Prospects for Justice in Rwanda's Citizens Tribunals*, 8 HUM. RTS. BRIEF 15 (2001) (generally arguing that the use of Gacaca tribunals to try genocide cases as envisaged in a 1999 government's proposal violated both domestic and international due process guarantees).

229. See Gaparayi, *supra* note 221, at 95; Vandeginste, *Justice*, *supra* note 153, at 25.

230. Ironside, *supra* note 98, at 51; Gaparayi, *supra* note 221, at 95. See also Sarkin, *supra* note 78, at 164-66.



Political Rights (ICCPR)<sup>231</sup> and the African Charter on Human and Peoples' Rights.<sup>232</sup> It is an "absolute right, suffering no exceptions."<sup>233</sup> Internal standards articulating such rights require that those who perform judicial functions be selected on the basis of their integrity and ability, and that they have appropriate training or qualifications in law.<sup>234</sup> Although the Gacaca lay judges have been subject to six days of intensive training on a variety of subjects, both the quality and duration of the training have been criticized as being inadequate and insufficient in view of the difficult functions they are called to exercise.<sup>235</sup> Gacaca judges are indeed expected to interpret and apply state legislation, to pronounce judgments in complex and sensitive cases, and to impose harsh sentences involving long prison terms.<sup>236</sup> Categorization of the accused (including Category 1 defendants, liable to the death penalty) is made at the lowest gacaca court level—the cell—where most of the judges are illiterate.<sup>237</sup> Trainees have also not been provided with basic resources and materials, such as the Gacaca law and explicative materials, and the training has not covered fundamental topics, such as those of compensation and community service either.<sup>238</sup>

Serious concerns also exist regarding the actual independence and impartiality of the Gacaca judges. As stated by the Honorable Sandra Oxner, "[J]udicial independence is about personal integrity and about institutions and mechanisms put in place to create an environment best suited for personal integrity to flourish."<sup>239</sup> In its articulation, this concept encompasses such diverse things as an adequate salary, "substantive" or "decisional" independence in making decisions without pressure from external sources—being it state organs, litigants, or the powerful—and "institutional" or "collective" independence of the judicial body as a whole, i.e. administrative and financial independence.<sup>240</sup> Impartiality, on the

231. International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, art. 14(1) (Rwanda acceded on Apr. 16, 1975).

232. African [Banjul] Charter on Human and People's Rights, June 26, 1981, 21 I.L.M. 58, arts. 7(1), 27.

233. Gonzalez del Rio v. Peru (263/1987), Oct. 28, 1992, Report of the Human Rights Committee, vol. II, at 20, U.N. Doc. A/48/48/1993 (1993).

234. United Nations, Basic Principles on the Independence of the Judiciary, at Principle 10, U.N. Doc. A/Res/40/146 (Dec. 13, 1985) [hereinafter *Basic Principles*]. Although such principles are not legally binding, they represent authoritative interpretations of states' due process obligations under international law.

235. The training was held between April and May 2002 and covered matters such as basic principles of law, group management, conflict resolution, judicial ethics, trauma, human resources, equipment and financial management. See Amnesty International, *Question of Justice*, *supra* note 83, at 27. See also African Rights, *supra* note 146, at 4-9 (reporting that trainers who included judges, human rights defenders, second year law students and government officials, had been trained themselves for ten days, and were each assigned a group of fifty to seventy trainees).

236. Gaparayi, *supra* note 221, at 90.

237. See African Rights, *supra* note 146, at 5-6 (commenting that, since the Department of Gacaca courts did not expect illiterate judges, the training was not designed to take their special needs into account).

238. *Id.* at 4-5, 9.

239. Sandra Oxner, The Quality of Judges § 4 (July 8-12, 2001) (paper presented at the World Bank Conference "Empowerment, Security and Opportunity through Law and Justice," Saint Petersburg).

240. *Id.* § 3. See also *Basic Principles*, *supra* note 233, at Principle 2. "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." *Id.*

other hand, requires that judges (professional or lay judges)<sup>241</sup> be free of bias or prejudice in each individual case.<sup>242</sup> The Gacaca law requests that all Gacaca judges be “Rwandans of integrity . . . free from the spirit of sectarianism . . . of high morals and conduct . . . [and] honest.”<sup>243</sup> It further establishes that they be removed from their functions in cases where they encourage “sectarianism” or have performed acts “incompatible with the quality of a person of integrity.”<sup>244</sup> Grounds of incompatibility of the role of a judge with some professions are also established by the law.<sup>245</sup> Finally, both the secret nature of judges’ deliberations, and the exclusion of judges from cases involving defendants to whom they are related or with whom there is a relationship of enmity or friendship,<sup>246</sup> should also guarantee their independence. However, despite such provisions, both the unique magnitude of the offenses committed, and the polarized nature of Rwandan society, pose serious challenges to the integrity of the most well-intentioned judges. Given the broad-based perpetration of genocidal violence, it is likely that most judges could be related to the victims in particular cases, compromising their impartiality in judging the suspects.<sup>247</sup>

Dangers related to the actual lack of impartiality and independence of the Gacaca courts do not only reflect on the defendants, but also on the victims. Communities that are predominantly Hutu, for instance, might very well favor defendants even where they have allegedly committed atrocities.<sup>248</sup> In general, there is a risk that, as they are currently conceived, Gacaca jurisdictions will replicate and amplify, “local political or ethnic dynamics [and may therefore] favor victims or the accused accordingly.”<sup>249</sup> Given the ongoing ethnic and political tension and the resulting strong polarization of the Rwandese communities, issues of lack of independence and impartiality may be seen as pervading the whole system, raising concerns as to the overall fairness and legitimacy of Gacaca trials.<sup>250</sup>

Finally, there are material factors that may pose a risk to the judge’s independence. Gacaca judges are indeed expected to exercise their functions without perceiving any form of remuneration, despite the risks and the level of commit-

241. Communication 387/1989, *Karttunen v. Finland*, Decision of Oct. 23, 1992, U.N. Doc. CCPR/C/46/D/387/1989 (1992).

242. *Basic Principles*, *supra* note 233, at Principle 2.

243. Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, art. 14. Elected judges must be at least twenty-one years old and, in addition to other requirements, must not have participated in perpetrating offenses constituting genocide or crimes against humanity. *Id.*

244. *Id.* art. 16(3), 16(6).

245. *See id.* art. 15. Judges cannot be: state officials; persons exercising political activities; active members of the national police or the army; members of religious groups and governmental organizations; or career magistrates. *See id.* art. 15.

246. *Id.* arts. 10, 21.

247. *Ironside*, *supra* note 98, at 52-53.

248. *Id.* at 55.

249. *Id.* at 52. *See also* Sarkin, *supra* note 78, at 161 (quoting Alison des Forges, “the fairness of the proceedings will vary enormously . . . [and] the result in any one community will be determined by the local balance of power”).

250. Amnesty International, *Question of Justice*, *supra* note 83, at 37. Appearance of independence relates to the question of whether litigants have a legitimate doubt about the tribunal’s independence, thus affecting the confidence that the courts must inspire in a democratic society. *See* Gaparayi, *supra* note 221, at 92.

ment that this implies.<sup>251</sup> This has been seriously criticized by external observers and the judges alike, as it may compromise their independence and integrity by making them susceptible to corruption.<sup>252</sup>

## XX. RIGHT TO DEFENSE

The procedural simplicity characterizing the Gacaca jurisdictions denies the very principle of equality of arms in criminal cases in several ways that favor the prosecution.<sup>253</sup> First, the Gacaca law does not entitle defendants to be represented by a lawyer, contrary to international fair trial standards.<sup>254</sup> It only provides an opportunity for the defendant to speak for himself, and for individuals at the hearings to speak for or against the defendant.<sup>255</sup> This may be problematic, as the majority of defendants have a low educational background and very limited, if any, awareness of their rights.<sup>256</sup>

The Rwandan government purports that the nature of Gacaca as a community forum ensures a procedurally equal position for both plaintiff and defendant.<sup>257</sup> According to this interpretation "the defense will be based on facts, possibly with the help of people giving evidence for the defense. The judges, not being jurists themselves, will not be bogged down with complicated principles of procedure. The accused, the judge, and witnesses, are on equal footing, and recourse to professional lawyers will merely upset the balance."<sup>258</sup>

The defendant's position may be further compromised by the fact that the majority of cases will be judged on the basis of the files prepared and handed over to the Gacaca judges by the public prosecutor's offices, making it difficult for lay judges and defendants—both of whom lack legal skills—to challenge the information contained in them.<sup>259</sup> The position of the defendant may be further compromised by the fact that Gacaca courts may, whenever necessary, be assisted by legal experts appointed by the National Service<sup>260</sup> whom, by virtue of their legal qualifications, may exercise considerable influence over the Gacaca judges. Defendants who choose not to confess are particularly vulnerable, as Gacaca courts can hear evidence from the public prosecutor.<sup>261</sup> Finally, defendants do not have

251. See *Gacaca Jurisdictions*, *supra* note 2 (stressing the difficulties faced by judges in administering justice in highly traumatized communities still deeply divided by mistrust, and the multiple sources of community pressure they are subject to—i.e. by the perpetrators, the survivors and their families). See also African Rights, *supra* note 146, at 14 (reporting that, despite early government promises, the Gacaca law does not provide for any compensation).

252. *Id.*

253. See Amnesty International, *Question of Justice*, *supra* note 83, at 32, 36-37 (discussing the implications of such principle).

254. The right to defense includes the right to defend oneself in person or through a lawyer. International Covenant on Civil and Political Rights, Dec. 19, 1966, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, art. 14 (3)(d); African Charter, art. 7(1).

255. Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, arts. 64-65, 68.

256. See Gaparayi, *supra* note 221, at 97.

257. Amnesty International, *Question of Justice*, *supra* note 83, at 36.

258. Jean de Dieu Mucyo (former Rwandan Minister of Justice), *Gacaca Courts and Genocide*, in RWANDA AND SOUTH AFRICA IN DIALOGUE, *supra* note 81, at 53.

259. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, arts. 46(3), 47. See also Amnesty International, *Question of Justice*, *supra* note 83, at 36.

260. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, art. 26.

261. *Id.* art. 65(5)(c).

access to their case file prior to the hearings, and will not be able to present witnesses in their defense nor to cross-examine witnesses.<sup>262</sup>

## XXI. RIGHT TO REVIEW BY A HIGHER TRIBUNAL

Under international fair trial standards, individuals convicted of a crime are entitled to have their conviction and sentence reviewed by a higher competent and impartial tribunal according to procedures established by law.<sup>263</sup> The Gacaca law provides for three means of appeal: opposition, appeal, and review of judgments passed by Gacaca courts.<sup>264</sup> While opposition can be made by defendants against judgments pronounced by any Gacaca court in their absence,<sup>265</sup> only Category 2 defendants have the right to appeal their sentence to the Gacaca court of appeal.<sup>266</sup> Judgments relating to offenses against property are not subject to appeal.<sup>267</sup> While the original Gacaca law allowed defendants to appeal their categorization before the Gacaca jurisdiction competent to try their case, this possibility no longer seems to be provided for by the amended version of the law.<sup>268</sup>

Review of judgments pronounced by Gacaca courts are allowed in the following cases: when an individual was acquitted in a judgment passed in the last resort by an ordinary court, but is later found guilty by a Gacaca court; when an individual was convicted by an ordinary court, but is later found innocent by a Gacaca court; when the sentence pronounced against a defendant contradicts the legal provisions of the offenses for which he is convicted.<sup>269</sup> The Gacaca court of appeal is competent to review such judgments. The fact that no appeal can ever be made to the ordinary courts is particularly troubling in the case of Category 2 defendants, some of whom are liable to severe sentences involving long prison terms. As it has been observed, “[b]y containing all hearings and appeals within . . . Gacaca . . . concerns about the absence of fair trial guarantees pervade the entire system.”<sup>270</sup>

262. *Id.* arts. 64-66, 68 (describing Gacaca hearings and judgments). While defendants are allowed to “comment on the accusations” made against them, “respond to the plaintiff’s declarations,” and “answer questions” put to them by “any person taking the floor,” no explicit reference is made to a right of defendants to cross-examine witnesses or present witnesses in their defense. *Id.* See also Ironside, *supra* note 98, at 54.

263. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 54, U.N. Doc. A/6316 (1966).

264. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, Chap. VI, arts. 85-93.

265. *Id.* arts. 41-43, 86-88.

266. *Id.* arts. 43, 89-91. Judgments passed by the Gacaca court of the sector in the first instance are appealed before the Gacaca court of appeal which gives a ruling in the last resort. *Id.*

267. *Id.* arts. 41, 89. However, other judgments pronounced by the Gacaca court of the cell—such as those pronounced in cases involving tampering of witnesses—are subject to appeal before the Gacaca court of the sector. *Id.* art. 89.

268. Compare Organic Law No. 40/2000 of 26/01/2001, *supra* note 3, art. 86, with Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, art. 92 (providing that, “if the Gacaca court to which an appeal is referred finds that the appellant has been classified in an inaccurate category, it classifies him or her in the category corresponding to offenses of which he or she is accused, and tries him or her at first and last resort”).

269. Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, art. 93.

270. Ironside, *supra* note 98, at 54.

## XXII. GACACA IN THE RWANDAN SOCIO-POLITICAL CONTEXT

The Gacaca jurisdictions cannot be seen in isolation, but rather they must be seen in the civil-political context characterizing transitional Rwanda.<sup>271</sup> Despite improvements over the last few years, the Tutsi dominated Rwandan government is still generally perceived as being neither pluralistic nor genuinely democratic.<sup>272</sup> The ruling party, RPF, dominates all the levers of power: the security services, the bureaucracy, the judiciary, banks, universities and state-owned companies.<sup>273</sup> The perceived exclusion of the majority Hutu from many government institutions, including the judiciary, makes the issue of genuine power-sharing a particularly pressing one.<sup>274</sup> This, in turn, fuels continuing political instability and social-ethnic tension, exacerbating dangers that the Gacaca jurisdictions may be vulnerable to local, political, and ethnic dynamics.<sup>275</sup>

In this context, some of the prisoners fear that the introduction of Gacaca courts may legitimize "popular retribution" on those presumed to be responsible for the genocide.<sup>276</sup> Moreover, the Rwandan government's position that the Gacaca courts will not hear accusations of war crimes and crimes against humanity committed by soldiers of the Rwandan Defense Forces (RDF, previously RPA), which must be taken to the regular courts, reinforces the perception of Gacaca as political justice and has been questioned by ordinary Rwandans as well as international observers.<sup>277</sup>

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271. Sarkin, *supra* note 78, at 159. See also Vandeginste, *Victims of Genocide*, *supra* note 105, at 249 (observing that the context in which Gacaca jurisdictions operate is not "neutral," but one characterized over time by intermitting armed conflict, genocide and political transition).

272. See Human Rights Watch, World Report 2003: Rwanda (2003), available at <http://www.hrw.org/wr2k3/africa9.html> (last visited on Oct. 24, 2004) [hereinafter Human Rights Watch, *World Report*] (reporting that the Rwandan government . . . demonstrated continuing hostility towards political dissent, press freedom and an independent civil society"). According to THE ECONOMIST, "Rwanda is tranquil: a staggering achievement. But the way the government enforces peace is disturbing." *Rwanda ten years on*, THE ECONOMIST, Mar. 25, 2004. Indeed, perhaps inevitably given the circumstance under which it came to power, "Rwanda's government is unique in Africa in that it tries to control not only what its citizens do, but also what they think [and] the RPF exercises tighter control over the country than perhaps any other African ruling party. There is no freedom of the press, because that might allow "divisionists" to spread once more their foul ideology. There is no freedom of association, either. Anyone who tries to set up a serious opposition party is subject to harassment, arrest and threats . . . Membership of the RPF is not compulsory, but prominent Rwandans come under great pressure to join." *The Road out of Hell*, THE ECONOMIST, Mar. 27, 2004. See also Amnesty International, Rwanda: Deeper into the Abyss - Waging war on civil society (July 6, 2004), available at <http://www.amnestyusa.org/countries/rwanda/document.do?id=80256DD400782B8480256EC900405DD4> (last visited Oct. 24, 2004).

273. See Kagame Won, *supra* note 89.

274. See Sarkin, *supra* note 78, at 152 (stating that "Hutus, for the most part, have been completely marginalized both politically and economically"). See also Charles Bigirimana, *It's tension all over as Kigaly heads for elections*, May 12, 2003, ALL AFRICA GLOBAL MEDIA, at <http://www.allafrica.com/stories/200305140605.html> (last visited Oct. 24, 2004).

275. Uvin, *supra* note 5, at 7.

276. See Penal Reform International, Research on the Gacaca—PRI Report V (Sept. 2003), available at [www.penalreform.org/english/gacaca\\_research.htm](http://www.penalreform.org/english/gacaca_research.htm) (last visited Oct. 24, 2004) [hereinafter PRI Report V] (reporting that, at least in one case, allegations were made that survivors had plotted to denounce all Hutus as *genocidaires* regardless of their actual participation in the killings).

277. See Human Rights Watch, *World Report*, *supra* note 272 (stating that the government tried to prevent the ICTR from investigating RDF suspects); Amnesty International, *Question of Justice*, *supra* note 83, at 28-29 (indicating this as a factor of reduced community participation during the Gacaca

On the other hand, there is widespread fear among survivors' groups that Gacaca may amount to *de facto* amnesty for those who committed terrible crimes.<sup>278</sup> Fear is sometimes compounded by frustration at the realization that, in many instances, prisoners may confess to their crimes with defiance and without showing the slightest remorse.<sup>279</sup> In general, there are concrete risks that Gacaca trials will be manipulated and "used for settling personal scores, political issues, issues of land and property, and family issues."<sup>280</sup>

The genocide has profoundly changed the social geography and composition of Rwandese communities. About 800,000 people were killed during the genocide, and some 80,000 individuals are currently still imprisoned as genocide suspects. Moreover, about 700,000 "old caseload refugees" recently returned to the country after decades of exile.<sup>281</sup> In total, the UN High Commissioner for Refugees has estimated that 3.2 million refugees returned to Rwanda in the period between 1993 and 2002.<sup>282</sup> These factors, coupled with the policy of forced collective resettlement pursued by the government since 1996, have radically altered the makeup of most Rwandan communities, possibly irremediably compromising the participatory and active role they should play to guarantee the effective functioning of the Gacaca jurisdictions.<sup>283</sup> The degree of public engagement necessary for the new Gacaca jurisdictions to function effectively might be further hampered by survivors' concerns for their security, and fears that they might be victimized

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pilot phase); Amnesty International, *Enduring Legacy*, *supra* note 198 (reporting that justice officials' claims that 1,800 members of the RPA were serving sentences for human rights abuses as of Oct. 2003 were contradicted by information obtained from the Military Prosecutor's Office indicating that only a few dozen of them had actually been prosecuted, and that those found guilty served minimal sentences). See also Catherine Honeyman et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 PEACE & CONFLICT: J. OF THE AMER. PSYCHOLOGICAL ASS'N. 1, 13 (2004) (lamenting the "corrosive effects of [the] assumed disregard for Hutu lives" where people in a village realized that "Inkiko-Gacaca could not even record the names of Hutus who had died in the cellule").

278. See Waldorf, *supra* note 198. See also Vandeginste, *Justice*, *supra* note 153, at 24 (stating that some survivors' groups have expressed concerns that genocide crimes will be "trivialized" through trials under Gacaca).

279. See PRI Report V, *supra* note 276, at 9 (observing that, in many instances, individuals suspected of genocide related crimes do not seem to be willing to take responsibility for their acts—which they attribute to "bad policy of the former government"—even when they confess to having committed them).

280. Sarkin, *supra* note 78, at 161. See also CAGEP Consult for USAID/Rwanda and Ministry of Justice and Institutional Relations, *Assessment of the Judicial Sector in Rwanda*, Nov. 2002 [hereinafter CAGEP Consult, *Assessment of the Judicial Sector*] (warning that judges could be subject to pressure from a variety of sources including administrative authorities, wealthy individuals, security services, as well as families of victims and alleged perpetrators).

281. Uvin, *supra* note 5, at 10. Old caseload refugees are Tutsi refugees who have lived outside Rwanda for decades. *Id.*

282. See United Nations High Commissioner for Refugees, *Voluntary Repatriation in Africa: Levels and Trends 1993-2002 Table 2* (Mar. 4, 2004), at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SPECIAL&page=events&id=404886df4> (last visited Oct. 24, 2004).

283. Vandeginste, *Justice*, *supra* note 153, at 1 (stating that the Rwandese "social tissue . . . has broken down"). See also Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 380 (stating that in many parts of Rwanda "there may be no such thing as community," and that the Gacaca jurisdictions may prove ineffective in communities largely composed of people who were not part of them during the genocide); African Rights, *supra* note 146, at 41 (estimating that it might be almost impossible to uncover the truth in regions predominantly inhabited by old caseload refugees or where there are barely any genocide survivors).

again.<sup>284</sup> This, in turn, may lead to further violence, instead of fostering peace. In March 2004 alone, fourteen people were sentenced to death and three to life imprisonment for having killed genocide survivors who were expected to testify before the Gacaca courts.<sup>285</sup> Not surprisingly, all these factors seem to have played a role in the so far low community participation in Gacaca, with the government estimating absenteeism in eight out of twelve jurisdictions during the pilot stage.<sup>286</sup> According to Penal Reform International—a Paris-based NGO involved in monitoring Gacaca—Rwandans are somehow still extremely skeptical of the courts, with more than half the population unwilling to participate actively in the process.<sup>287</sup>

While the government has reacted to the reluctant engagement of Rwandans by creating a “duty to participate” in the court’s activities,<sup>288</sup> it is doubted that this will favor genuine commitment to the system. There is a risk that, although Gacaca provides an opportunity for ordinary people to be involved in the administration of justice to an unprecedented degree, “this is not a role with which they are familiar, nor one of their own choosing. The [new] Gacaca courts do not have [the] prior credibility of . . . an acknowledged traditional authority or belief system [common to] customary approaches to justice” remaining, instead, a state creation.<sup>289</sup> Finally, concerns have been raised that—similar to colonial uses of indigenous dispute resolution systems—a state-mandated use of Gacaca to deal with genocide cases may undermine its original value as an informal, spontaneous dispute resolution mechanism.<sup>290</sup>

### XXIII. SEEKING JUSTICE, MOVING FORWARD: PROPOSALS TO MITIGATE SHORTCOMINGS IN GACACA

This section of the paper tries to strike a balance between justice and reconciliation, punishment and restorative measures. Where justice in the form of retribution and punishment is sought, it is argued, fundamental due process rights should be respected. On the other hand, if Gacaca is not to become simply “an-

284. Nicole Itano, *Rwandan Community Courts Slow to Bring Justice*, CHRISTIAN SCIENCE MONITOR, Nov. 8, 2002, available at <http://www.csmonitor.com/2002/1108/p08s01-woaf.html> (last visited Oct. 24, 2004). See also PRI Report V, *supra* note 276, at 5 (observing that, in some areas, survivors and witnesses are reluctant to testify as they fear for their personal security).

285. UN Office for the Coordination of Human Affairs, *Rwanda: Nine sentenced to death over killing of genocide survivors*, Mar. 8, 2004, available at [www.irinnews.org/print.asp?ReportID=39896](http://www.irinnews.org/print.asp?ReportID=39896) (last visited Oct. 24, 2004).

286. Waldorf, *supra* note 198.

287. See also PRI Report V, *supra* note 276, at 18 (reporting that more than half of the population do not wish to participate actively in the Gacaca sessions).

288. Organic Law, No. 16/2004 of 19/6/2004, *supra* note 4, art. 29. Article 29 states:

Every Rwandan citizen has the duty to participate in the Gacaca courts activities. Any person who omits or refuses to testify . . . shall be prosecuted by the Gacaca court . . . [and] incurs a prison sentence from three (3) months to six (6) months. In case of repeat offence, the defendant may incur a prison sentence from six (6) months to (1) one year.

*Id.*

289. African Rights, *supra* note 146, at 3. See also Uvin, *supra* note 5, at 10 (stating that the government’s process of “sensitization” to the Gacaca jurisdictions has been, at least initially, mostly “top-down” and one-sided, neglecting the adoption of a more “horizontal,” participatory approach, and reporting the lack of involvement of NGOs in the formulation and design of the courts).

290. Vandeginste, *Justice*, *supra* note 153, at 22-23. See also Sarkin, *supra* note 78, at 170.

other layer in the implementation of genocide trials,”<sup>291</sup> a shift in the emphasis from a predominantly retributive scheme to one more restorative is needed.

While fraught with challenges, the best contribution Gacaca may make is to prove that, far from being mutually incompatible, both the quest for justice and reconciliation are indeed possible and can be reconciled in some way.

While human rights activists have strongly criticized the disregard of due process rights in Gacaca, other observers have regarded this as the price to be paid in view of its purported restorative, therapeutic, communitarian approach.<sup>292</sup> The truth is that in transitional societies recovering from atrocities perfect justice will more likely be a utopia. This is even more so in the case of Rwanda, where no system in the world would be able to deliver model justice if challenged by a comparable situation.<sup>293</sup> This does not mean that Rwanda should abdicate completely its obligations. While justice may not necessarily be equated with Western principles, as the experience with the South African TRC has shown, there are some measures that the Rwandan government could adopt if Gacaca is not to become a “vehicle for summary and arbitrary justice that fails defendants and genocide survivors alike.”<sup>294</sup> These measures would imply both amendments to the Gacaca law and other concrete steps to ensure that dangers implicit in Gacaca are minimized.

#### XXIV. DUE PROCESS RIGHTS

Under the Gacaca law defendants are not entitled to be represented by a lawyer.<sup>295</sup> The law should be amended to include such a possibility, to conform with international fair trial standards. These standards establish the right to have legal counsel assigned by the state to indigent defendants where the interest of justice so requires.<sup>296</sup> Such determination is primarily based on the seriousness of the offense and the potential maximum punishment.<sup>297</sup> Category 2 defendants who

291. Drumbl, *(A)lure of Genocide Trials*, *supra* note 39, at 224.

292. *Id.* (arguing that “the more legal or juridical [G]acaca is pressured by the international community to become, the less effective it may be in stripping away the silence of complicity, barriers to shame, and resistance to the therapeutic discussion so needed to heal Rwanda”). See also Ironside, *supra* note 98, at 57-58 (stating that “Gacaca offers a promising means for Rwandans to draw together and gain a greater sense of justice and healing than experienced thus far,” and that “as very little justice has been achieved to date for Rwandans under the status quo . . . Gacaca offers a solution . . . albeit an imperfect one”).

293. See Ironside, *supra* note 98, at 57.

294. Press Release, Amnesty International, Rwanda: Gacaca - Gambling with Justice (June 19, 2002), available at <http://web.amnesty.org/library/Index/ENGAFR470032002?Open&of=ENG-RWA> (last visited Oct. 24, 2004).

295. See discussion *infra* Part XX.

296. International Covenant on Civil and Political Rights, Dec. 19, 1966, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, art.14 (3)(d). According to this provision, everyone shall be entitled, in the determination of any criminal charge against him “. . . to defend himself in person or through legal assistance of his own choosing . . . and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.” *Id.*

297. See Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary 259-60 (N.P. Engel, Arlington 1993). For instance, the Human Rights Committee has held that any person charged with a crime punishable by death must have counsel assigned. See *Henry v. Jamaica* (571/1994), July 25, 1996, Report of the Human Rights Committee, ¶ 9.2, U.N. Doc. CCPR/C/57/D/57



are liable to lengthy prison terms, up to 30 years imprisonment—i.e. those accused of murder or attempted murder—should be entitled to legal counsel at the expense of the state. Given the still acute shortage of legal personnel in Rwanda, a legal aid scheme could be set up that would include not only full-fledged lawyers, but also other categories such as legal advisors, law professors, law students, and representatives of NGOs that have a background and experience in human rights in general and fair trial standards in particular. To encourage their participation, the Rwandan government, with the assistance of the international donor community, could make some form of benefits available.

Alternatively, for the same crimes under Category 2, the recourse to the Gacaca jurisdictions could be made conditional upon consent of the defendants themselves. Should they not consent they should be tried by the ordinary courts, where respect for due process rights is at least nominally guaranteed.

Given the difficult and professional nature of the task imposed upon Gacaca judges, it appears that provisions should be made to grant them some form of compensation,<sup>298</sup> either in the form of a “salary-type remuneration” or other form of non-monetary compensation, such as the payment of primary care assistance or primary school fees for their children.<sup>299</sup> While the first option may be unattainable given the high number of judges, and the fact that it is less akin to the philosophy of Gacaca courts as instruments of popular justice, symbolic forms of compensation may satisfy direct needs of individuals while at the same time contribute to longer-term prospects of societal development.<sup>300</sup> A recent initiative by the Rwandan government directed at providing free medical insurance to families of the Gacaca judges should be welcomed as a first step in this direction.<sup>301</sup> Such arrangements reduce the risk and perception of corruption, enhance the status and prestige of judges in the eyes of the community, as well as represent an incentive favoring their long-term commitment to the Gacaca process.

Additional training should also be provided to all judges in order to enable them to best perform their difficult mandate. This training should be particularly targeted at members of the cell Gacaca benches, who perform the crucial function of categorizing all accused.

## XXV. STRIKING A BALANCE: JUSTICE VERSUS RECONCILIATION

In the aftermath of the genocide, the exclusive recourse to criminal trials, adjudication and imprisonment as mechanisms of individual accountability have

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1/1994 (1996).

298. Compensation proportionate to the responsibility and social status conferred by the judicial office is an important requirement to support individual judicial integrity. See Oxner, *supra* note 239, at 23.

299. See *Gacaca Jurisdictions*, *supra* note 2. See also CAGEP Consult, *Assessment of the Judicial Sector*, *supra* note 280, at 75 (reporting that 41.5 percent of judges think the provision of some form of remuneration is necessary to guarantee the success of Gacaca).

300. See *Gacaca Jurisdictions*, *supra* note 2. While the majority of Gacaca judges are in favor of some form of compensation, some of them favor such compensation to be in the form of “free transport, health expenses, school fees for their children . . . [or anything else] that will . . . confer [some] standing on them.” See African Rights, *supra* note 146, at 15.

301. Zac Nsenga, Rwandan Ambassador to the United States, in a personal communication to the author (Nov. 11, 2004).

failed to promote justice and societal reconciliation.<sup>302</sup> There is a risk that, fully implementing the project of popular retribution as currently envisaged in the Gacaca jurisdictions may further antagonize what is an already deeply divided society, and compromise the many potential strengths of Gacaca as a vehicle of participatory, restorative justice.

While prosecuting and punishing the worst perpetrators of genocide in Rwanda (i.e. the leaders and organizers as well as those who committed the killings) seems to be necessary to instill a culture of accountability and break the cycle of impunity, “it may be insufficient to strike on its own at the root” the inner social and political factors which made such large scale atrocity possible, and which can, if left unaltered, determine its recurrence.<sup>303</sup>

As it has been argued, the nature of Rwanda as a dualist post-genocidal society characterized by unavoidable Hutu-Tutsi interdependence and commingling, coupled with the high degree of public participation and complicity in the genocide, make it well-suited to benefit from restorative justice approaches that prioritize the restoration of peace in local communities by repairing injuries, encouraging repentance, promoting rehabilitation, and, eventually, facilitating reintegration.<sup>304</sup> Shifting the emphasis from the retributive to the restorative paradigm, within or outside Gacaca, may indeed better guarantee justice and individual accountability without compromising the achievement of peace and stability in the long-term.<sup>305</sup> It would also considerably offset human rights concerns linked to Gacaca’s disregard for due process rights of defendants.

## XXVI. COMPLEMENTING THE PROSECUTORIAL MODEL: ESTABLISHING A TRUTH COMMISSION

Trials by Gacaca may become more effective where they are complemented by the functioning of a truth commission.<sup>306</sup> The commission would be an independent body comprised of individuals from all ethnic groups, each with objective credibility for their moral integrity, impartiality, and fairness.<sup>307</sup> The mandate of such commission should be all-encompassing, by investigating not only crimes committed by the Hutu population in the context of the genocide, but also human rights violations committed by the RPF in the context of the civil war. Like in South Africa, this would send the message that the government respects human rights so much that it would respect the rights of even those who supported the

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302. See Drumbl, *Sclerosis*, *supra* note 10, at 288. See also Sarkin, *supra* note 78, at 288; MINOW, *supra* note 15, at 51 (calling for an “honest modesty” about the transformative potential of trials).

303. See Kritz, *Progress and Humility*, *supra* note 13, at 60.

304. See Drumbl, *(A)lure of Genocide Trials*, *supra* note 39, at 221-25, 229.

305. *Id.* at 229 (arguing that a restorative justice model may create in Rwanda “fertile ground” for the growth of much needed multi-ethnic power-sharing structures and institutions).

306. Some authors have recommended that Rwanda establish a truth commission to investigate genocide-related crimes. See Sarkin, *supra* note 78, at 166-70 (arguing against the role to be played by Gacaca in trying genocide suspects, and proposing, instead, the exclusive prosecution of the main leaders of the genocide together with the establishment of an independent truth commission). See also Drumbl, *Sclerosis*, *supra* note 10, at 296 (proposing the establishment of a truth commission involving not only victims and perpetrators, but also international actors who—directly or indirectly—enabled the violence).

307. See Kritz, *Progress and Humility*, *supra* note 13, at 61 (discussing proposals to create a Truth and Reconciliation Commission in Bosnia and Herzegovina).

genocide and personally committed atrocities.<sup>308</sup> Addressing such crimes would also pose the basis for mutuality and full historical accuracy. It could also critically confer the commission much needed legitimacy, altering the so far widespread perception that victor's justice is being pursued in Rwanda. Similar to the South African TRC, the commission would travel the country providing Rwandans, victims and perpetrators alike, with an impartial forum to recount their history and give their version of the truth. While the commission would call on perpetrators to give their side of the story and to repent for their actions, it would not, like the TRC, exchange truth for amnesty.

Such a forum could help Rwanda in establishing a much needed historical account not only of what happened but also of why it happened. The striking extent of public participation in the atrocities, and the fact that so many Rwandans were complicit in the face of their public nature, strongly argue for the need to shed light on the underlying factors that made these atrocities possible. The "open, discursive nature" of a truth commission would arguably better address the problem of widespread complicity in the genocide.<sup>309</sup> In order to establish as truthful and comprehensive a picture as possible, the commission would not only investigate individual abuses, but also focus on the broader socio-political context in which they occurred. In particular, it would examine the role played by various sectors of the society, like the religious leadership, the media, and the political establishment that actively supported and encouraged the genocidal violence.<sup>310</sup> In South Africa, an entire volume of the TRC's Final Report was dedicated to the findings of institutional hearings, and proved to be indispensable in ascribing important political responsibilities to the government and political-societal apparatus.<sup>311</sup> Likewise, in Rwanda, this would somehow permit to hold whole sectors—that will never be the subject of criminal prosecutions—accountable for the genocide, as well as create an historical record of the causes and wider context of an otherwise inexplicable violence. Not doing so, on the other hand, would perpetuate mutual distrust, engender the ethnic divide and irremediably compromise any prospect of genuine, lasting peace in Rwanda.

In a unique and innovative way, the commission would also substantially expand its mission of truth gathering by calling attention not only to the atrocities committed, but also by documenting the positive stories of "ordinary heroes," those who, at great personal risk, maintained their humanity and protected Tutsi neighbors and others who were targeted in the frantic wave of violence.<sup>312</sup>

Most importantly, such a truth seeking process could help the Rwandan society move towards a common and consensual account of the causes and character of wrongdoing before, during, and after the genocide. This would create an unde-

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308. See Daly, *Transformative Justice*, *supra* note 27, at 155 (commenting on the benefits of the South African TRC).

309. See Aukerman *supra* note 27, at 82 (generally discussing benefits of truth commissions).

310. See Little, *supra* note 27, at 77 (discussing the mandate of the proposed Truth and Reconciliation Commission in Bosnia and Herzegovina).

311. See van Zyl, *supra* note 61, at 749 (discussing the South African TRC).

312. This aspect was included in the project for the establishment of a Truth and Reconciliation Commission in Bosnia Herzegovina. Despite the promises it held, the establishment of the commission was aggressively opposed by senior officials within the International Criminal Tribunal for the Former Yugoslavia who were concerned about its future interaction and competition with the tribunal's role and activities. See Kritz, *Progress and Humility*, *supra* note 13, at 61-67.

niable, irreversible truth in a country where even the teaching of history is seen as controversial. As it has been observed, the development of a “common national historical narrative” based on a shared interpretation of the facts is indispensable if perpetrators and victims are to continue to live together.<sup>313</sup> By providing a national forum for victims from all sides of the conflict, the commission would facilitate a national dialogue between Rwandans on the genocide, its causes and, hopefully, the kinds of reforms—both at the institutional and political level—needed to prevent its recurrence. The commission would complement, not replace, trials for the most egregious violations before the special genocide chambers. It would also work in parallel with trials conducted by Gacaca, although these would be conducted differently from their current design.

## XXVII. ENHANCING THE RESTORATIVE ASPECT OF GACACA

The restorative potential of Gacaca proceedings could be enhanced by partly drawing on the approach taken by the Commission for Reception, Truth and Reconciliation (CRTR), which was established in East Timor with the assistance of the United Nations in 2001. Besides being tasked with establishing the truth about human rights violations committed in East Timor under Indonesian rule, the CRTR has been responsible for an innovative “Community Reconciliation Process” directed at favoring the reintegration into local communities of persons accused of having committed less serious crimes in the context of the political violence infesting the territory between 1974 and 1999.<sup>314</sup> This process has been regarded as representing “less an amnesty solution . . . than a model for conflict management permitting [perpetrators of lesser crimes] . . . to return to their homes” upon taking responsibility for their actions and carrying out some form of community service to the benefit of the local population.<sup>315</sup>

Under the new scheme, Gacaca courts would continue to try Category 2 defendants (i.e. the perpetrators, or accomplices of homicide or serious assault resulting in death, those who attempted to kill, and those responsible for other assaults). These courts would, on the other hand, be stripped of their retributive functions and reconfigured to fashion sentences in a more flexible, creative way for the lesser offenses committed by Category 2 defendants (comprising persons who committed assaults or who were accomplices in committing assaults without the intention to kill their victims). Doing so would enhance the restorative nature

313. See Susan Dwyer, *Reconciliation for Realists*, 13 ETHICS & INT’L AFF. 81, 89-90 (1999). See also Aukerman, *supra* note 27, at 89 (stating that, by articulating “many sides of the same story . . . [truth commissions] may be . . . better at fostering social solidarity in societies where guilt runs in multiple directions”).

314. See Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L L. 952, 953 (2001) [hereinafter Stahn]. For a description of the Community Reconciliation Process, see UNTAET Regulation No. 2001/10, Part IV (July 13, 2001) (on the establishment of a Commission for Reception, Truth and Reconciliation in East Timor), available at <http://www.easttimor-reconciliation.org>.

315. See Stahn, *supra* note 314, at 957. Perpetrators of lesser crimes are in this way granted immunity from civil and criminal prosecution. Under this scheme, serious criminal offenses, such as crimes against humanity, murder, torture, and rape, are prosecuted by special panels of the Dili District Court, while for minor offenses such as theft, minor assault, arson, or the killing of livestock, the individual may request to participate in the Community Reconciliation Process. *Id.* at 960-61, 964.

of Gacaca and also eliminate most due process concerns linked to its current implementation.

In these cases, and partly mirroring the procedure before the East Timorese CRTR, the accused individual may apply to participate in a Community Reconciliation Process by submitting a statement to Gacaca that includes a full description of the relevant acts, an admission of responsibility, and a renunciation of the use of violence for ethnic and political motives.<sup>316</sup> The case would then be examined by the Gacaca judges. At the public Gacaca hearing, the judges will hear from the applicant, the victim, and other members of the community, as it is currently envisaged. In a variation of the process, and upon hearing suggestions made by the victim and the applicant alike, the judges will then inform the perpetrator of the act of reconciliation deemed most appropriate in the specific case. This may include the performance of community service, reparation, public apology, and/or any other "act of contrition," along with a prescribed time limit for performance.<sup>317</sup>

In determining the most appropriate act of reconciliation, the Gacaca judges will consider not only the actual nature of the crime, but also the total number of acts committed by the applicant, as well as his role in the commission of the crime. In the latter case, special emphasis will be put on whether the applicant was actively involved in the planning, organization, or ordering of the crime, or was following the orders of others in carrying it out.<sup>318</sup> If accepted by the applicant, the act of reconciliation would be confirmed in a Community Reconciliation Agreement signed by him and by the Gacaca panel and then registered in the district court. The district court would have the discretion to reject an agreement if it finds that the act of reconciliation exceeds what is "reasonably proportionate" to the acts disclosed or that it violates human rights principles.<sup>319</sup> Should the perpetrator subsequently fail to fulfill the terms of the agreement, the case will be returned to Gacaca for normal adjudication.

In cases where either the victim or the applicant disagree with the act of reconciliation proposed by the Gacaca panel, the procedure and penalties currently envisaged for perpetrators of lesser crimes belonging to Category 2 would continue to apply.<sup>320</sup> Unlike the current Gacaca process, as a result of which different prison terms and/or community service are automatically applicable—in the latter case upon the confessor's approval—the new process would actively involve victims and perpetrators, with their community supporters, to decide the form accountability will take. It would thus empower all people concerned to "determine their needs at the most local level."<sup>321</sup>

Allowing the community to creatively and flexibly fashion sentences for the least serious crimes would importantly recognize that victims have different recovery needs, and would arguably give them a more powerful voice than what is

316. See UNTAET Reg. No. 2001/10 § 23.

317. See *id.* § 27.7. See also Kritz, *Progress and Humility*, *supra* note 13, at 79 (generally describing the CRTR's Community and Reconciliation Process).

318. See *id.* Schedule I.

319. UNTAET Reg. No. 2001/10 §§ 27.8, 28.2.

320. See Organic Law No. 16/2004 of 19/6/2004, *supra* note 4, arts. 54, 56, 58, 62-65, 73.

321. See Daly, *Punitive and Reconstructive Justice*, *supra* note 76, at 391 (suggesting that the Gacaca law be amended to empower the courts to grant selective and conditional amnesty).

currently envisaged in the Gacaca process. It would also better reflect—in a situation where government hate propaganda and manipulation have had such a devastating impact—the different gradations of individual and collective responsibility that may emerge from the Gacaca hearings. Shifting the focus from the possibility of retribution in the form of imprisonment and/or performance of community service, to a variety of optional restorative measures would also enhance chances that the defendant will effectively reintegrate into the community. By focusing more closely on the needs of all parties involved in the crime, including the victim and the community where it took place, the restorative nature of Gacaca would guarantee a genuinely holistic approach to justice and, hopefully, increase the chances of peaceful coexistence in the future.

## XXVIII. CONCLUSION

The challenging task of combining retribution with reconciliation is most daunting in transitional societies recovering from mass violence. The Rwandan experience shows the limits of the conventional prosecutorial approach in achieving these goals, and points towards the need for innovation and flexibility as part of a comprehensive response to horrendous crimes.<sup>322</sup>

Through Gacaca, Rwanda has courageously taken an unexplored path. Rwanda's unconventional experience in prosecuting genocide suspects through the use of village courts extends beyond its context by setting a new precedent in the field of transitional justice and in the search of pragmatic approaches to accountability for atrocities. It represents a test case in creatively shaping and adapting traditional dispute resolution systems to address the competing, partly conflicting goals of justice and reconciliation. Gacaca has a lot of potential: through a highly inclusive approach, it makes accountability, in the wider sense of justice and social reconciliation, the ultimate aspiration of every Rwandan. By acknowledging the suffering of individual victims and their families, and by allowing individuals on both sides of the ethnic and ideological divide to publicly relate their stories, the Gacaca proceedings may dissipate feelings of collective guilt, foster a rule of law supportive culture, facilitate reconciliation, and give to participants a much needed sense of dignity, empowerment and, to some degree, closure. It also indicates that pragmatic and context-sensitive solutions may potentially achieve more goals than the traditional approach of criminal prosecutions. Nonetheless, there are serious flaws in the system that may irremediably compromise the achievement of these objectives and reinforce the perception of many that a partisan version of justice is taking place in the shadows of the genocide.

With retribution retaining a central role in Gacaca, efforts must be made to respect the due process rights of those brought before it. Although the Rwandan government still views individual prosecutions—by the ordinary or Gacaca courts—as the only way of achieving justice, there are a series of alternatives that could assist in increasing Gacaca's credibility and legitimacy. In this view, a mixed, multi-dimensional approach combining restorative initiatives—such as the creation of a truth commission and the reconfiguration of Gacaca to emphasize its restorative approach for lesser offenses—with trials for the most egregious viola-

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322. Strain & Keyes, *supra* note 93, at 131.

tions, may better suit the partly conflicting goals of justice and societal regeneration. More importantly, the credibility and ultimate practicability of any post-genocide accountability mechanism is predicated upon its perceived legitimacy and, ultimately, even-handedness and ability to deliver genuine justice to all segments of the population, victims and perpetrators alike. While serious political and social challenges face the Gacaca jurisdictions, only time will tell whether these have truly been the last best chance for justice, stability and social reunification in a deeply wounded nation.